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STATE SECRETS—A COMPARATIVE STUDY

It is proposed in this article to examine the rights of the litigant who desires production of Crown documents. These rights, it will be contended, are inadequate. The law in the United States will also be sketched, and some proposals for reform made there will be considered. In the light of the above, amendments to the present English law will be tentatively suggested.

England

At common law there were two separate rules affecting the production of documents. Firstly, the Crown, by virtue of its prerogative,[1] could not be subject to an order for discovery.[2] Nor did the rules of the Supreme Court made under the Judicature Acts bind the Crown.[3] Secondly, whether the Crown was a party to litigation or not, it could refuse the production of a document if its production would be contrary to the public interest.

The leading case on the second rule is *Duncan* v. *Cammell Laird & Co., Ltd.*[4] in which Viscount Simon, then Lord Chancellor, delivered the only judgment after consultation with, and with the approval of, six other law lords. In a civil action the defendants refused to produce the plan of a submarine built by them when the First Lord of the Admiralty filed an affidavit objecting on the ground that it would be contrary to the public interest to produce it. Without inspecting the document, the House of Lords held that the document should not be produced. With the decision itself it seems difficult to quarrel, but the wide principles laid down in the judgment have been criticised.[5] Viscount Simon said[6]:—

1 *Att.-Gen.* v. *Newcastle-upon-Tyne Corporation* [1897] 2 Q.B. 384 at 395 (*per* Rigby J.).

2 *Thomas* v. *Reg.* (1874) L.R. 10 Q.B. 31 at 44; *The Helvetia* [1879] W.N. 48; *Crombie* v. *R.* [1923] 2 D.L.R. 542; *Michigan Fruit Co.* v. *R.* [1937] O.W.N. 685.

3 *Re La Société les Affréteurs Réunis and the Shipping Controller* [1921] 3 K.B. 1 at 20 (*per* Greer J.).

4 [1942] A.C. 624. This decision conflicts with the earlier Privy Council case, *Robinson* v. *State of South Australia* (*No.* 2) [1931] A.C. 704. The Attorney-General for New Zealand has said that in practice *Duncan's Case* will be followed there; 20 N.Z.L.J. (1943) 3; cf. Garrow and Willis, *Law of Evidence in New Zealand*, 2nd ed., 172.

5 *E.g.*, Note in 58 Law Quarterly Review (1942) 436; R. Pound, Note in 56 Harvard Law Review (1942) 806; D. P. Jamieson, 'Proceedings By and Against the Crown in Canada' in 26 Canadian Bar Review (1948) 373 at 386.

6 *Ibid.* 636.

> 'The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.'

Under (b) Viscount Simon supported the non-disclosure of Government files, not because anything secret was contained in them, but 'on the ground that the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation'.[7]

Further, the House overruled earlier cases[8] holding that the judge could probe an objection to produce by looking at the document. The objection of a head of a Government department is conclusive, if validly taken. Not merely is the judge unable to look at the document, but if any party is about to put in evidence such a document, it is the duty of the judge to stop him and refer the matter to the appropriate Government department for decision.[9] It should be noted that the 'judgment of the House in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same'.[10]

Viscount Simon laid down the principles which should be followed by Ministers in deciding whether to object to production[11]:—

> 'It is not a sufficient ground that the documents are "State documents" or "official" or are marked "confidential". It would not be a good ground that, if they were produced, the consequences might involve the department or the Government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the Minister of the department does not want to have the documents produced. The Minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example,

[7] *Ibid.* 635.

[8] *E.g., Asiatic Petroleum Co., Ltd.* v. *Anglo-Persian Oil Co., Ltd.* [1916] 1 K.B. 822; *Spigelmann* v. *Hocker* (1932) 50 T.L.R. 87; *contra Beatson* v. *Skene* (1860) 5 H. & N. 838; *Hughes* v. *Vargas* (1893) 9 T.L.R. 471; *Re Joseph Hargreaves, Ltd.* [1900] 1 Ch. 347.

[9] *Hennessy* v. *Wright* at 519; *contra* C. S. Emden, 'Documents Privileged in Public Interest', in 39 L.Q.R. (1923) 476 at 481.

[10] *Ibid.* 633–4. Cf. *R.* v. *Taylor*, [1950] 2 All E.R. 170, at 172.

[11] *Ibid.* 642.

> where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.'

It is becoming a common judicial practice to suggest to the executive how it should exercise its discretions.[12] These judicial suggestions can usually be dismissed as mere exhortations having no legal effect, and it has been said that this rather platitudinous statement of Viscount Simon is ' not binding as a matter of law '.[13] Perhaps this last assertion is too sweeping.[14] It is true that one of the main weaknesses of English administrative law is that the effectiveness of judicial control is often in direct proportion to the extent to which the administrator has given reasons for his actions : the courts will not look behind the administrative decision, but will quash it if it is bad on its face, as it will be if reasons wrong in law are given for the action.[15] It is submitted that it would be consistent with the dicta of Viscount Simon to apply that rule here. His view that the affidavit is conclusive means that the court cannot go beyond it. Yet he emphasises that ' the decision ruling out such documents is the decision of the judge '. If this emphasis has any point at all, it surely must mean that if in the affidavit itself the reasons given for non-production are wrong in law because they are contrary to these principles, the judge can declare the objection invalid and order production of the document. There are dicta in Commonwealth decisions to support this view.[16] Moving even further in this direction is the judgment of Lord Birnam in a Scottish case.[17] Commenting on this dictum of Viscount Simon, he said :—

> ' . . . the Lord Chancellor stressed the importance of remembering " that the decision ruling out such documents is the decision of the judge ". If, as was maintained in the present case, the court is bound by the opinion of the Chairman of the Board of Control I fail to see that it would be important or indeed accurate to attribute the decision to the judge.'

Of course, so long as the current habit of the Administration not to justify their actions by reasons persists, not even the power to

12 *E.g.*, *Sebel Products, Ltd.* v. *Commissioners of Customs and Excise* [1949] Ch. 409 at 413 (*per* Vaisey J.).

13 Glanville Williams, *Crown Proceedings* (London, 1948), 130, n. 15.

14 Cf. Keir and Lawson, *Cases in Constitutional Law* (3rd ed., 1949) 508 that the judgment of Viscount Simon is ' the best statement of the law ' on the topic.

15 *E.g.*, *Hanson* v. *Radcliffe U.D.C.* [1922] 2 Ch. 490; *R.* v. *Ludlow* [1947] 1 K.B. 634 at 638–40 (*per* Goddard L.C.J.); *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1951] 1 T.L.R. 270.

16 *Griffin* v. *South Australia* (1925) 36 C.L.R. 378 at 397 (*per* Rich J.) : ' Exceptional cases may arise where the claim is obviously futile and the Minister has misconceived the case and taken a mistaken view as to what documents are relevant '; *Sachs* v. *Minister of Justice* [1934] A.D. 11 at 27 (*per* Tindall J.); *Carmichael* v. *Scottish Co-operative Wholesale Society, Ltd.*, 1934 S.L.T. 158 at 159 (*per* Lord Wark).

17 *M'Rae* v. *M'Rae*, 1947 S.C. 173 at 175.

declare an affidavit bad on its face will afford much protection to the aggrieved subject.

As the protection given by this second rule is so wide, the Crown Proceedings Act is able to give the subject involved in litigation with the Crown the right to obtain an order for discovery against the Crown.[18] At the same time, the rule in *Duncan* v. *Cammell Laird* is expressly saved by a proviso. If the Crown is a party to the litigation it need not disclose the existence of a document which it considers injurious to the public interest, and it may withhold from production any document the existence of which has been disclosed, by making an objection in the usual manner.[19] It is not clear how the Crown could require a litigant in proceedings to which it is not a party not to disclose a document. Nothing in the Act affects the right (discussed in the preceding paragraph) of the court to see whether the objection is validly made.

In England, by contrast to the United States, these rules have not been often at issue in judicial reviews of administrative adjudications. This is because so often the Executive has used its influence to prevent matters which involve the consultation of State documents from being regarded as justiciable at all. For example, when the Minister of Local Government and Planning, or rather the unidentified official in his department, decides under the Housing Acts whether to confirm a compulsory purchase order after the holding of a local inquiry, one cannot doubt that files relating to various technical aspects of the problem, as well as the inspector's report, will be consulted. Had the decision to make or confirm the order been treated as judicial, then, the courts, like those of the United States, would have had to determine whether objections to production of these files could be sustained. So long as there is no hearing at all, and not even the '*audi alteram partem*' rule of natural justice can be invoked, the further question of refusal to disclose files cannot come before the courts. Lord Greene, indeed, has said that the production of files in this class of case is 'alien to our whole concept of Government in this country'.[20] This judicial abstention from control of the Administration is severely criticised by American commentators on the relations between the law and the Executive in England.[21]

United States

The rules on discovery of State documents in the United States are not so clear-cut as in England but are perhaps more satisfactory.[22]

[18] Section 28 (1).
[19] Section 28 (2); Ord. 31, r. 30.
[20] *B. Johnson & Co. (Builders), Ltd.* v. *Minister of Health* [1947] 2 All E. R. 395 at 401.
[21] B. Schwartz, *Law and the Executive in England* (New York, 1949), *passim*.
[22] Wigmore, *Evidence*, Vol. 8, § 2378 *et seq.*; J. W. Moore, *Federal Practice* (Albany, 1939), Vol. 2 at 2642; J. D. O'Reilly, 'Discovery against the United

Each head of department is authorised by statute to 'prescribe regulations not inconsistent with law for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it '.[23] Departments have framed regulations forbidding their subordinates to disclose any documents without the consent of the Attorney-General.[24] Wigmore [25] thought that the regulations were *ultra vires* but they have been upheld by the courts.[26] Although the Court of Claims may 'call upon any of the departments for any information or papers it may deem necessary' the head of the department may refuse 'when in his opinion, such compliance would be injurious to the public interest '.[27]

The American courts have developed a theory of waiver. They have held that if the Government is instituting criminal proceedings the accused is entitled to production of the Government files and documents.[28] It is felt that it would be prejudicial to deny him access to material which the Government has been able to use in preparing its case. Here the statutory prohibitions are overridden.[29] It seems from the following judgment of Learned Hand J. that the degree to which the documents are relevant is estimated by the court.[30] Ordering the production of the reports of officials withheld from prisoners accused of conspiracy, he said [31] :—

> 'However, none of these cases involved the prosecution of a crime consisting of the very matters recorded in the suppressed documents, or of matters nearly enough akin to make relevant the matters recorded. That appears to us to be a critical distinction. While we must accept it as lawful for a department of the Government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal proceeding, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate.'

States—A New Aspect of Sovereign Immunity?' in 26 North Carolina L.R. (1942) 1; J. A. Pike and H. G. Fischer, 'Discovery against Federal Administrative Agencies' in 56 Harvard L.R. (1943) 1125; R. Haydock Jr., 'Some Evidentiary Problems Posed by Atomic Energy Security Requirements' in 61 Harvard L.R. (1948) 468; Note, 'Government Privilege against Disclosure of Official Documents' in 58 Yale L.J. (1949) 993.

23 Revised Statutes, § 161.

24 11 Federal Regulations 177A–107, sub-para. E, §§ 51, 71.

25 *Op. cit.* 790.

26 *Ex p. Sackett* (1935) 74 F. 2nd 922.

27 U.S. Judicial Code, tit. 28, para. 272.

28 *U.S.* v. *Krulewitch* (1944) 145 F. 2nd 76.

29 *U.S.* v. *Beekman* (1946) 155 F. 2nd 580 at 584 (*per* Frank J.).

30 Approved by Wigmore, 1947 Supplement, 138.

31 *U.S.* v. *Andolschek* (1944) 142 F. 2nd 503.

The same right to production is given to an applicant for *habeas corpus*, statutory bar notwithstanding.[32]

Questions of discovery have become very important in American administrative law, and may become so in England if the setting up of the Monopolies and Restrictive Practices Commission should herald the use of the commission on the American model as an instrument of administrative control. These are typical American problems. The Federal Trade Commission seeks an injunction against a corporation to restrain it from carrying on an unfair trade practice. The corporation wants access to the files of the commission, to learn in advance details of the particular transactions relied on, and perhaps to discover how much the commission knows. Or, on a Government contract there may be a report by an inspector that the work is below specification, a copy of which is sought by the contractor who complains of breach of contract. Of course, these problems may raise other issues in the law of discovery, that a party shall not be required to disclose material relevant solely to his own case, that ' fishing ' is forbidden, or that information may not be demanded if it is already possessed by the applicant. The plea of ' State secrets ' will in itself not excuse a department from disclosing information within its knowledge.[33] More controversial is the question whether files can also be demanded. The cases are conflicting,[34] and it may be that if the relevance of the files is proved, and if no other privilege prevents it, the Government must produce them.

None the less, if the court finds that the document is an international or military secret of State then it will always uphold an objection to production. It cannot be stated with certainty what are the limits of these privileged State secrets, but the tendency is to limit them to ' pending international negotiations or military precautions against foreign enemies '.[35] For example, in *Robinson* v. *U.S.*[36] the Treasury refused to produce the correspondence relating to this suit for breach of contract, and relied on an opinion of the Attorney-General[37] that the certificate of the head of the department is conclusive. Ordering the production of the correspondence, the court said[38] :—

> ' The power given to a head of a department to comply with a call for information or papers is not an arbitrary power to be exercised at will and to make the law and principle in regard to these calls differ in the case of one department from what it would be in that of another. It is a legal

[32] *U.S.* v. *Watkins* (1946) 67 F. Supp. 556.
[33] *Fleming* v. *Bernardi* [1941] 1 F.R.D. 624.
[34] *Walling* v. *Comet Carriers Inc.* [1944] 3 F.R.D. 442; *U.S.* v. *General Motors Corp.* [1942] 2 F.R.D. 528; *Walling* v. *Twyffort Inc.* (1947) 158 F. 2nd 944; *Bowles* v. *Ackerman* [1945] 4 F.R.D. 260.
[35] Wigmore, *op. cit.* § 2378a.
[36] (1915) 50 Ct.Cl. 159.
[37] (1871) 130 Op. 539.
[38] *Ibid.* 165.

discretion to be exercised under the circumstances of a particular case.'

At the same time, the opinion of the departmental head will carry great weight.[39] In *Crosby* v. *Pacific Steamship Lines*[40] an agent sued for commission on the sale of ships to the British Ministry of War Transport. An official of that ministry refused to produce letters which determined whether there had been an effective agency. Haney J., ordering the letters to be produced, said[41] :—

'Finally, refusal would be justified only when the public interest would suffer by the disclosure. Does this mean that Walsh [the British official] is the final authority on that point? All reason says that the question is one for the court to determine.'

The courts recently have gone to considerable lengths to hold that the Government is an interested party, thereby bringing in the principle of waiver. In *Zimmerman* v. *Poindexter*[42] the plaintiff sued the ex-Governor of Hawaii for false imprisonment, and sought discovery from an army officer of confidential reports made by the Federal Bureau of Investigation. Because of the federal element in the case, and because United States attorneys represented the defendant (although the United States had no pecuniary interest in the suit) the court held that this was not a private suit and ordered production of the reports.[43]

It is clear that the United States courts are far less willing than the English courts to support a plea of privilege, and do not share the unwillingness of the latter to look themselves at the documents.

The Concept of Public Interest

The Memorandum to the Crown Proceedings Bill justifies section 28 (2) as follows[44] :—

'. . . the object of this provision is to maintain that degree of secrecy which is essential to protect the interests of the community in regard to defence, foreign relations, and related matters.'

It would be generally agreed that a provision which achieved that and no more would be unobjectionable. The sponsors of this Bill could scarcely maintain that it covers this and no more. If that were the object of it, why did the Government refuse to adopt the suggestions made on the second reading in the House of Commons that 'public security' or 'public safety' or 'defence of the realm' be substituted for 'public interest'?[45] Objection was also

[39] *Pollen* v. *Ford Instrument Co.* (1939) 26 F. Supp. 583.
[40] (1943) 133 F. 2nd 470.
[41] *Ibid.* 475.
[42] (1947) 74 F. Supp. 933.
[43] *Ibid.* 936.
[44] At ii.
[45] *Hansard*, Vol. 439, No. 135, cols. 1727–8.

made to the fact that departments would determine conclusively whether the matter was of 'public interest'. The Government spokesmen were at some pains to assure Parliament that the power would not be abused. For instance, the Attorney-General said [46]:

> 'If a Minister, having considered the matter personally, is not able to decide that it is essential that a document should be withheld, he will disclose it along with all the other documents relevant to the case'

and added that during the tenure of that Government no document had been withheld except on the personal judgment of the Minister concerned. The question arises whether it is wise to couch legislation in general terms in reliance on assurance by Government spokesmen that advantage will not be taken of that general language. One Minister cannot bind his successors; surely there was a need for more restrictive drafting.

'Public interest' can be a large umbrella for the most varied of activities. It is instructive to examine the cases in which the plea has been made by the Crown.

Many of them have been libel actions based on official reports. Typical is *Beatson* v. *Skene*,[47] a libel action arising from a squabble between two army officers, in which the production of correspondence between the plaintiff and the War Office and of minutes of a military inquiry was refused. Pollock C.B. said [48]:—

> '. . . it cannot be laid down that all public documents, including treaties with foreign powers, and all the correspondence that may precede or accompany them, and all communications to the heads of departments, are to be produced and made public whenever a suitor in a court of justice thinks that his case requires such production. It is manifest (we think) that there must be a limit to the duty or power of compelling the production of papers which are connected with acts of State.'

On this one might comment: why refer to such irrelevancies as secret treaties, production of which the plaintiff neither sought nor contended could be demanded? This was no case of the plaintiff merely 'thinking' that the documents were relevant—they were the basis of his case as the court itself recognised by allowing secondary evidence of the facts; no attempt is made to define 'the limit' referred to in the judgment. Another illuminating case is *West* v. *West*,[49] an action against a father-in-law whose allegedly slanderous conversations with the Lord Chamberlain about the plaintiff had caused her no longer to be invited to court balls. The refusal of the Lord Chamberlain to disclose these important 'State secrets' was upheld by the court. It would be fair to say that the usual consequence of the upholding

[46] *Ibid.*, col. 1686.
[47] (1860) 5 H. & N. 838.
[48] *Ibid.* 852–3.
[49] (1911) 27 T.L.R. 476.

of State privileges in these actions has been to enable an individual, often a civil servant, to evade on technical grounds a liability in tort.[50]

In several divorce actions the production of medical records of soldiers has been requested. In *Anthony* v. *Anthony*,[51] for example, the issue was whether the husband had contracted syphilis during military service. Both parties wanted production of his military records, but the court took the War Office view that the public interest was best served by not producing them.[52] This refusal to produce medical records will be increasingly important if the Ministry of Health refuses to produce the medical records which doctors must supply to it under the National Health Service Act, 1946.[53]

A liquidator who had taken out a misfeasance summons against directors could not have the balance sheets of the company when they were in the hands of the Inland Revenue.[54] The refusal of the Minister of Transport, in an action for damages against a railway company arising out of a railway accident, to let a plaintiff have access to a report on the accident sent by the defendants was upheld,[55] although his predecessor, the President of the Board of Trade, had never withheld them from litigants.[56] The protests of the judges at the lack of assistance from the Local Government Board were unavailing in an action for nuisance caused by a smallpox hospital where the report of the inspector of the board was withheld.[57] In a recent Australian case,[58] it was material to a private suitor to establish at what time a telephone call had been made to a police station. Relying on *Duncan* v. *Cammell Laird*, the court held that the production of this State secret, the local police station telephone book, was injurious to the public interest.

It cannot be denied that the law should not allow the production of documents if to do so would endanger public safety, or indeed the public interest. But is not the consideration of the public interest afforded by our present system a one-sided one? The executive, and, one fears, the judicial attitude may be summed up in the words of Pollock C.B.[59] :—

> '. . . the public interest must be considered paramount to the individual interest of a suitor in a court of justice.'

50 *Home* v. *Bentinck* (1820) 2 B. & B. 130; *Wyatt* v. *Gore* (1816) Holt (N.P.) 299; *Bradley* v. *M'Intosh* (1884) 5 Ont. R. 227.
51 (1919) 35 T.L.R 559.
52 Cf. *King* v. *King* [1944] Q.W.N.(Aust.) 25.
53 National Health Service (General Medical and Pharmaceutical Services) Regulations, 1948 (S.I. 1948, No. 506), as amended; and G. D. Nokes, 'Professional Privilege' in 66 L.Q.R. (1950) 88.
54 *Re Joseph Hargreaves, Ltd.* [1900] 1 Ch. 347.
55 *Ankin* v. *L.N.E.R.* [1930] 1 K.B. 527.
56 *Woolley* v. *N.L.R.* (1869) L.R. 4 C.P. 602.
57 *Att.-Gen.* v. *Nottingham Corporation* [1904] 1 Ch. 673; 2 L.G.R. 698.
58 *Seeney* v. *Seeney* [1945] Q.W.N. 20.
59 *Beatson* v. *Skene* (1860) 5 H. & N. 853.

A more precise analysis of this 'public interest' is called for. There is a public interest in the general security and in public safety which clearly will justify the withholding of military secrets. As Pound has said,[60] this interest is paramount, and, therefore, documents relating to defence or international affairs ought to be withheld.

It could be argued that the interest in political institutions buttresses the claimed privilege, even beyond the sphere of international and military affairs. Viscount Simon justifies the privileges attaching to documents as a class not because of their contents but because 'the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed'.[61] This argument might be less open to objection if the secrecy were indispensable for inducing freedom of official communication or efficacy in the transaction of official business, and if the secret has remained inviolable.[62] Yet even thus restricted it calls for comment. Is it proved that employees make reports less honestly if they think that there is the slightest possibility of someone other than their employers seeing them at some future time? And if the argument has substance, is it not also applicable to the employees of public authorities other than the Crown, in respect of whom there is no similar privilege?[63] Is it true that 'Government servants are reluctant to put their observations into writing if they are likely to be produced in a court of law?'[64]

One might assume from the approach of Viscount Simon and other judges, that the public interest is a stable concept consisting of some one element, which, when opposed by some conflicting private interest, shall always be supreme, something *ab extra*, which 'operates from outside the law as a paramount censor of rules of law and legal rights'.[65] That English judges have in the past viewed public policy in the field of contract in this light, is a commonplace.[66] Yet, it is clear that in a given case there may be several public interests involved, often conflicting ones. Is there not a public interest in the preservation of free political institutions against the acts of arbitrary political authority? Moreover, that antipathy between public and private interests at which Viscount Simon hints, is surely misleading. If the private interest is an interest in securing an adequate remedy

[60] R. Pound, "A Survey of Social Interests" in 57 Har.L.R. (1943) at 17. Cf. *Dusfresne Construction Co., Ltd.* v. *R.* [1935] Ex. 77 at 85 (*per* Angers J.).
[61] *Ibid.* 635.
[62] Wigmore, § 2378a.
[63] *Blackpool Corporation* v. *Locker* [1948] 1 K.B. 349 at 380 (*per* Scott L.J.).
[64] Sir Thomas Inskip, 'Proceedings by and against the Crown' in 4 Cambridge L.J. (1930) 1 at 10.
[65] J. Stone, *Province and Function of Law* (London, 1947), 494.
[66] Lord Wright, 'Public Policy' in *Legal Essays and Addresses* (London, 1939), 66–95; Stone, Ch. 20 *passim*.

for a tort whether committed by a civil servant or otherwise, then it is also the public interest that justice should be administered so that the innocent are compensated for the wrongs done to them by their fellows.

It is contended, therefore, that sometimes there may be an overriding public interest in the non-disclosure of public documents, that the extent of that interest varies from case to case, and it will normally appertain only to defence and diplomatic matters, that often there are conflicting public interests, and that a decision whether a document is to be produced should only be made after these conflicting interests have been weighed. The dictum of Viscount Simon himself that ' in criminal trials where an individual's life or liberty may be at stake, it is not necessarily the same ' is some recognition of the soundness of this reasoning.[67]

It might be objected that many of these arguments have lost their force in view of the Governmental assurances on the passing of the Crown Proceedings Act, and that the cases cited have been without exception pre-Act ones. Two recent newspaper reports of cases, one of which the writer has been able to verify, indicate that little change in Governmental attitude is to be expected. In one,[68] a wife cross-petitioned against her husband for divorce on the ground that he had service medical treatment for venereal disease during military service abroad. The War Office refused the request of the husband, who indignantly denied the allegation, that his medical history sheet be produced, on the ground that it was contrary to the public interest. Then the wife herself made inquiries, and was shown the very document which it was prejudicial to the public interest to produce to the court, and, satisfied that her charge was groundless, withdrew her cross-petition. In the other,[69] an inquest was held on an ex-serviceman, who had dropped dead on a special drill course. A pathologist gave evidence that the deceased's heart was twice its normal size, and that to take such a drill course was ' the worst thing he could have done in his condition '. At the coroner's inquest, an army officer attended the inquest with the medical sheet of the deceased, but, acting on instructions from the War Office, refused to disclose the document, the protests of the coroner notwithstanding.

The question next to be answered is who, the judge or the Minister, should determine the issue of public interest. The various reasons why the House of Lords has held that it must be the Minister will now be examined. The dicta of Pollock C.B.[70] that a judge could only consider the matter in public and that this is a matter for private consideration only were quoted with apparent approval by Viscount Simon.[71] It is, of course, a sound

[67] *Ibid.* 633.
[68] *Evening News* newspaper (London), July 25, 1949.
[69] *Manchester Guardian* newspaper, January 18, 1950; February 2, 1950.
[70] *Beatson* v. *Skene* (1860) 5 H. & N. 838 at 853. [71] *Ibid.* 639.

principle that publicity assists impartial administration. That there are desirable limits to the application of the principle should not, as here, be made the pretext for an increase in arbitrary action. An impartial judge as well as a Minister biased in favour of the department can adjudicate in private, if necessary. Secondly, several Government spokesmen on the Crown Proceedings Bill, and Viscount Simon in *Duncan* v. *Cammell Laird* have explained that the judge would, if he were to see the documents, communicate with one party to the exclusion of the other, and it is a first principle of justice that the judge should have no dealings in the matter in hand with one litigant save in the presence of and to the equal knowledge of the other.[72] But will the other party consider himself thereby aggrieved if the only alternative is a conclusive determination by a political chief from whom there is no appeal?

Surely the crucial issue is which is most competent to assess the public interest, the executive or the judiciary. Viscount Simon has no doubt that it is the executive. It is, however, to be noted that this view seems to rest on the assumption that departmental interest and public interest are one and the same. The emphasis is on ' detriment to the public service ' or ' exigencies of the public service '.[73] No attempt was made to balance competing interests. To concede that the executive is the best judge of its own interests is not to agree that it can best weigh the several social interests involved in deciding whether evidence on a particular fact in a particular case should be given. Or, as an American writer on some problems of atomic energy has written, the problem is one of balancing a ' court's historical " expertness " in protecting individual rights ' with ' its inexpertness in the technical problems of atomic energy '.[74] The War Office at least in part recognises the problem by its statement that its policy is to disclose service records in serious criminal cases only.[75] Can this rule-of-thumb test, which ignores the materiality of the evidence and attaches so little importance to civil and non-serious criminal cases, be accepted as an adequate appreciation of social interests?

The Attorney-General on the second reading of the Crown Proceedings Bill argued that where ' policy ' is concerned ' it is for Ministers and not for the courts to judge and the Ministers must discharge their responsibilities under the control of Parliament '.[76] Here, of course, is one of the fundamental problems of administrative law. It is a resuscitation of the view of the Committee on Ministers' Powers that decisions may involve three elements, law,

[72] *Ibid.* 640–1.
[73] *Ibid.* 640, citing with approval *Admiralty Commissioners* v. *Aberdeen Steam Trawling and Fishing Co., Ltd.* [1909] S.C. 335 at 340.
[74] Haydock, *op. cit.* 475.
[75] See n. 68, *supra.*
[76] *Hansard*, Vol. 439, No. 135, col. 1691.

fact, and policy, and that where the third is involved, then it is for the executive to decide.[77] This 'hoary'[78] distinction is still not abandoned by some. To replace the word 'policy' by 'discretion' clarifies the matter. Decisions by the courts can involve at any time law, fact and discretion in varying proportions. No one denies that a judge exercises discretion when deciding whether to grant a decree nisi to a petitioner for divorce who confesses his own adultery. What determines whether the court can handle a matter involving discretion is the degree of discretion involved. It may be so wide that it is exclusively a matter for the executive. The word 'policy' must not be used as a blanket justifying the executive claim to a monopoly of discretionary decisions by reliance on the constitutional maxim of political responsibility. One can agree that it is for the Minister of Local Government and Planning to decide in his discretion whether Stevenage is to be a new town without at the same time agreeing that the executive must decide whether documents are to be produced in litigation before ordinary courts.

Viscount Simon further thought that the judges were unsuited to the task because they 'would need to learn the methods of the Department, and that would be perfectly impracticable'.[79] Implicit in this again is the view that it is the departmental interest that matters, but disregarding that implication, it seems within the competence of a judge to learn the reasons with which the executive supports its argument that a document should not be produced. Judges grapple with facts more technical than these. Nor does the assertion that matters of State are too confidential to be communicated to the judges seem a cogent reason for denying judicial competence. These documents are, after all, seen by many civil servants. Is a High Court judge to be trusted less with a serviceman's medical sheet than the lance-corporal in the orderly room, or the sick-quarters orderly?

It has also been pointed out that some judges themselves have thought that they could not decide these matters. Perhaps the observations of a member of the House of Commons are in point[80]:

> '. . . it is perfectly natural for judges to say: "This is an enormous responsibility. Why should it be pushed on to us? We have quite enough work to do as it is". I do not think judges are themselves the best people to decide whether they should undertake this duty.'

There seems then no good reason why the judge should not decide whether the disclosure of the existence or contents of a

[77] At 73.
[78] W. I. Jennings, 'The Report on Ministers' Powers' in 10 Public Administration (1932) 333 at 345.
[79] *Hansard*, Vol. 146, col. 929.
[80] *Hansard*, Vol. 439, col. 1712.

document is injurious to the public interest. It remains to consider what legislative changes should be made to effect this reform.

Some Proposals for Reform

The French rule that only the Conseil d'Etat and not the parties can demand production of the evidence seems unsatisfactory. Deserving of more detailed study are the provisions contained in the Model Code of Evidence drawn up by the American Law Institute.[81]

A distinction is drawn there between ' secret of state ' and ' official information '. The former is defined as ' information not open or theretofore officially disclosed to the public concerning the military or naval organisation or plans of the United States, or a State or Territory, or concerning international relations '. ' Official information ' means ' information not open or theretofore disclosed to the public relating to internal affairs of this State or of the United States acquired by a public official . . . in the course of his duty '. Unless either the judge finds that it is not a ' secret of state ' or the head of a department consents to its disclosure a secret of State must not be disclosed, and a judge is empowered to prevent its disclosure even if both parties are willing. ' Official information ' is not to be disclosed if the judge finds that it is ' official information ' and if also its disclosure ' will be harmful to the interests of the government of which the witness is an officer in its governmental capacity '.

This distinction between ' secret of state ' and ' official information ' is a sound one. It recognises that the paramount interest in security requires that secrets of State should be *ipso facto* free from disclosure at the discretion of the executive. Not so satisfactory is the provision relating to ' official information '. It revives the governmental/proprietary distinction which has bedevilled administrative law in civil law countries since the Romans developed *fiscus*, which jurists have been striving to eradicate from American local government law,[82] and from which England has been mercifully free. There would have been no need to include it had the rule dealt with the interests of the public instead of those of government.

What is called for is a balancing of the conflicting interests. Military and diplomatic secrets excepted, there is no justification for the assumption that governmental interest overrides all other considerations. The judge should be empowered to decide whether the production of any official information would be injurious to the public interest. The claim to non-disclosure could be made by

[81] (Philadelphia, 1942) Rules 227 and 228.
[82] D. W. Doddridge, ' Distinction between Governmental and Proprietary Functions of Municipal Corporations ' in 23 Michigan L. R. (1925) 325.

affidavit, and, if a party objected, the matter could be raised on an *ex parte* application.[83] The documents and a detailed statement of reasons for non-disclosure could be forwarded under seal to the judge who would decide in his private room whether the documents should be produced. This procedure would seem not to imperil the public safety in any way, and would at the same time prevent excessive executive interference with the administration of justice.

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[83] Cf. E. F. Iwi, letter to *The Times* newspaper, February 19, 1947.

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SOME ASPECTS OF MUTUAL WILLS

THE subject of mutual wills is one which appears so rarely in English law reports that it might be regarded as one of purely academic interest. *Re Green*,[1] however, demonstrates that such wills are still made, and that the subject has practical importance. At the same time it affords an opportunity of reviewing some of the consequences which flow from mutual wills, consequences which perhaps are not always contemplated by the authors of such documents. The general principle has been summarised thus: 'Where two persons have made an arrangement as to the disposal of their property and executed mutual wills in pursuance thereof, on the death of one of them without having revoked his will, the arrangement crystallizes into a contract. Accordingly the personal representatives of the survivor take the survivor's property upon trust to perform that contract'.[2]

The nature of the obligation.

The two concepts of trust and contract are somewhat loosely used in this context. In the normal case it is a third person, a stranger to the mutual will agreement, who, as one of the ultimate beneficiaries after the dropping of both lives, is seeking to enforce it. Clearly as a stranger he must find more than a contract in his favour. He must find a trust. Moreover, since generally he is a volunteer, he must go further, if he is to succeed, and show that the trust is fully constituted.[3] That the trust concept is at the foundation of this doctrine was recognised in *Dufour* v. *Pereira*,[4] the parent case. Although Lord Camden, there, used the word 'contract' it is clear that he regarded the arrangement as more than that, and expressly calls the survivor a trustee.[5] In the same way Lord Haldane insisted on proof of a clear agreement before the court could find that a mutual will arrangement had come into being.[6] He did so because without that agreement there could be no trust, not because without it there would be no contract. There is therefore little dispute about the nature of the rights involved, or about the conditions necessary to the existence of the agreement. The difficulties that arise relate rather to proof of compliance with those conditions. On that point *Re Green* (*supra*) has at least removed doubts which had arisen as a result of *Re Oldham* [7]

[1] *Re Green* (*Deceased*), *Lindner* v. *Green and Ors.* [1950] 2 All E.R. 913.
[2] *Williams on Executors*, 12th ed., p. 78.
[3] *Jeffries* v. *Jeffries* (1841) Cr. & Ph. 138.
[4] (1769) 1 Dick. 419; more fully reported in 2 Hargr.Jurid.Arg. 304.
[5] 2 Hargr.Jurid.Arg. at p. 310.
[6] *Gray* v. *Perpetual Trustee Co., Ltd.* [1928] A.C. 391, 400.
[7] *Re Oldham*, *Hadwen* v. *Myles* [1925] Ch. 75.

whether the trust could exist when the gift to the survivor in the first testator's will was apparently absolute. *Re Green* establishes that it can if the evidence is strong enough. If, however, the general principles governing the existence of this trust are sufficiently clear the same cannot be said of its details, incidents and consequences, and it is with these that the present inquiry is chiefly concerned.

The Creation of the Trust.

It may obviously be important to determine at what point of time and by what act the trust is brought into being. There are at least three possible times from which it might be treated as binding, namely, the date when the agreement was made, the date of death of the first testator,[8] or the date of death of the survivor. To select the first date would mean that the arrangement could not be revoked even during the life of both parties to the agreement, save by mutual consent and then only if a power of revocation were reserved.[9] It is no doubt open to two persons, who so desire, to achieve this by making a common pool of their property to be held on trust for themselves for their lives with remainders to the agreed ultimate beneficiaries. Such an arrangement would, however, lack the advantage of the ambulatory character of wills and it is clear that the trust under mutual wills is not binding as from the date of the agreement. Either party may revoke his will during their joint lives, at least on giving notice to the other.[10] Notice is required in order to give to the other party an opportunity of revoking his will also, if he wishes, and does not seem to be necessary where the revoking party is the one first to die.[11] The surviving party in the latter case is free of any obligation, but, *semble*, has no claim against the estate of the first to die.[12] Nevertheless, the agreement itself is not entirely without effect. Thus it can operate to sever a joint tenancy [13] and will, it seems, serve to delimit the bounds of the trust. The third starting point—the death of the survivor—is expressly ruled out by *Re Hagger* [14] where the beneficiaries, who had predeceased the survivor were, nevertheless, held entitled since they took not under the survivor's will but by virtue of a trust operative from the death of the first party to die.[15] This last-mentioned date must therefore be taken as the date at which the trust comes into being.

8 For brevity this phrase will be used to describe the first party to the mutual will arrangement to die.
9 *Ellison* v. *Ellison* (1802) 6 Ves. 656.
10 *Dufour* v. *Pereira*, 1 Dick. at p. 419; 2 Hargr.Jurid.Arg. at p. 308.
11 *Stone* v. *Hoskins* [1905] P. 194, 197.
12 *Ibid.*
13 *Re Hagger, Freeman* v. *Arscott* [1930] 2 Ch. 190, 194.
14 *Ibid.* at pp. 195–196.
15 Contrast the statement of principle from *Williams on Executors* (*supra*), and see *Birmingham* v. *Renfrew* (1937) 57 C.L.R. 666, *per* Dixon J.

Granted that this is the true date a subsidiary question arises, does the trust become operative by reason merely of the first testator having died leaving unrevoked a will in the agreed terms or does it become operative only if the survivor takes and does not renounce the benefits conferred on him by the will? If the latter is the true rule then a disclaimer will operate to free the survivor from his obligations under the agreement. This becomes of greater importance once it is recognised that the doctrine of mutual wills can operate even where gifts are apparently absolute. In such cases the gifts to the intended ultimate beneficiaries in the first testator's will may not be operative where they are phrased, as is usual, only to take effect in the event of the death of the other party to the mutual will arrangement during the lifetime of the testator, since that contingency will not have happened. There could therefore be an intestacy under which the survivor (assuming he or she to be a spouse of the testator) would take and yet be free of any obligation under the agreement. To exclude the possibility it seems desirable that in such cases the ultimate gifts should be phrased so as to take effect either on the earlier death or renunciation of the other party. It is not, however, certain that renunciation will free the survivor. At first sight Lord Camden seems to have been of opinion that the death of the first party by itself made the arrangement binding. He said, 'It is too late afterwards for the survivor to change his mind because the first dier's will is then irrevocable, which would otherwise have been differently framed if that testator had been apprised of this dissent',[16] but he also said 'consider how far the mutual will is binding and whether the accepting of legacies under it by the survivor is not a confirmation of it. I am of opinion it is'.[17] Clauson J. inclined to the view that the agreement would be binding even though the survivor did not elect to take benefits under the first will.[18] On the other hand Gorell Barnes P. stated,[19] (although *obiter*) that it was the taking of a benefit which binds; but again the statement is not clear. Astbury J.[20] and Sir John Collier[21] seem to support this view as do some of the text writers.[22] Nevertheless it is thought that the logic of Lord Camden's judgment requires that the other view should be accepted—that death alone suffices—since the core of his argument is that the 'first dier' would not have made his will in the form he did but for his belief that the scheme would be carried out and 'no man

[16] 1 Dick. at p. 419; 2 Hargr.Jurid.Arg. at p. 308.
[17] This point seems however to be added for greater certainty, there having been an acceptance in the case before him.
[18] *Re Hagger*, *supra*, n. 13, at p. 195.
[19] *Stone* v. *Hoskins*, *supra*, n. 10, at p. 197.
[20] *Re Oldham*, *supra*, n. 7, at p. 89.
[21] *Dennyssen* v. *Mostert* (1872) L.R. 4 P.C. 236, 253.
[22] See Keeton, *Trusts*, 4th ed., p. 178; *contra Williams on Executors*, 12th ed., p. 78.

shall deceive another to his prejudice '.[23] It is thought therefore that the disclaimer is immaterial, but that nevertheless the precaution in drafting suggested above is desirable.

Scope of the Trust.

The date of creation has important consequences on the scope of the trust. It is obvious that where the first testator's will only gives a life interest to the survivor, no question arises in relation to that estate. It must be held upon trust to give effect to the whole will including the ultimate dispositions. Similarly even if it apparently gives an absolute interest, yet the survivor holds all that he receives thereunder on trust for himself for life and then for the ultimate beneficiaries.[24] The trust, however, where the doctrine applies, affects not only the estate of the first testator but also that of the survivor. The question is as to the extent to which it does so. Is the entirety comprised in it and if so is it the entirety as at the first death or does the trust also comprise after-acquired property?

The short answer would simply be that the extent of the trust is defined by the agreement. Thus in *Re Green* the trust was to operate on property received from the other party and on property which was derived from another trust.[25] This definition might be express, as in that case, or implied, by reason, for example, of the fact that the ultimate gifts are set out in specific sums and not as residuary dispositions. This short answer is not, judging from the few reported cases, satisfactory since the agreement is often silent or ambiguous on the point. In one case[26] the trust apparently only affected property held by the survivor at the first death. That restriction was perhaps dictated by the fact that the mutual wills were only intended to deal with the assets of the two testators which resulted from a business they had carried on together. It was therefore reasonable to allow the survivor a free hand with the fruits of his unaided labour. In *Re Oldham*[27] Astbury J. seemed disposed to hold that the trust only binds the property held by the survivor at the time of his death, thus leaving unimpaired the power of disposition *inter vivos*. This seems to conflict with the decision as to lapse in *Re Hagger*, which implies

[23] *Dufour* v. *Pereira*, 2 Hargr.Jurid.Arg. at p. 310. Added support for this argument is to be found in the cases on secret trusts, where again it is this deceit of the testator which is critical. See also *Strickland* v. *Aldridge* (1804) 9 Ves. 517 and the other cases discussed in Keeton, *op. cit.* at p. 56.

[24] *Re Green*, *supra*, n. 1.

[25] In this respect *Re Green* does nothing more than make clear the effect of the agreement, which was implicit in earlier decisions such as *Re Hagger*, at p. 195, or *Re Oldham*, where, had the trust been regarded as effective, there would nevertheless have been some free property. The arrangement in *Dufour* v. *Pereira* seems only to have covered residue. See 2 Hargr.Jurid.Arg., p. 305.

[26] *Re Hagger*, *supra*, n. 13.

[27] [1925] Ch. at p. 88.

that the interest of the beneficiaries is vested during the lifetime of the survivor. Moreover a devise to A with a direction to settle ' so much as he shall die seised of ' has, by reason of uncertainty, been held incapable of creating a trust.[28] Yet, in effect, that is what the view of Astbury J. amounts to. The significance of this question lies of course in the powers of the survivor over his own property during his life. It would seem absurd if the court is prepared to prevent his breaking faith with the first testator only to the extent of preventing inconsistent testamentary dispositions thus allowing him to make the arrangement nugatory by dispositions *inter vivos*. It seems, therefore, that the two arguments of certainty and good faith lead to the conclusion that, in the absence of any definition, the trust of the survivor's property must be treated as embracing that which he holds at the death of the first testator together with subsequently acquired property; though clearly he will be entitled to deal freely with the income of the fund and accumulations of the income. Such indeed seems to be the implication to be drawn from Lord Camden's direction for accounts to be taken in *Dufour* v. *Pereira*, and to have been the opinion of Lord Loughborough. It was one of his objections to finding an agreement in *Lord Walpole* v. *Lord Orford*,[29] that it would have resulted in an inability of the survivor to raise portions for his daughters by mortgage. This breadth of the scope of the trust, or at least the possibility of it, affords another reason for delimiting it in the agreement.

Consequences of the Trust.

When the scope of the trust is determined, it is possible to discuss its consequences. The fact that those claiming under the survivor do so by virtue of a trust and not under his will must exclude not only the doctrine of lapse[30] but also the application of section 15 of the Wills Act, 1837, so that the claim of the beneficiary will not be prejudiced by his having attested the survivor's will,[31] though any claim under the first testator's will must, it seems, be governed by that section. More important is the effect of such an arrangement upon possible claims under the Inheritance (Family Provision) Act, 1938. Where the survivor has remarried, claims under that Act are possible, provided that he has made a new will. Although this new will is ineffective to dispose of property comprised in the trust, it is valid as a will.[32] The

[28] *Bland* v. *Bland* (1745) 2 Cox 349. See also *Re Jones* [1898] 1 Ch. 438.
[29] (1797) 3 Ves. 402, 417. For the opposed view see however Dixon J. in *Birmingham* v. *Renfrew* (1937) 57 C.L.R. 666, 689.
[30] *Re Hagger*, *supra*, n. 13.
[31] Compare *O'Brien* v. *Condon* [1905] 1 Ir. R. 51, or *Re Young (deceased)*, *Young* v. *Young* [1950] 2 All E.R. 1245, dealing with the position of the beneficiary under a fully secret trust which is analogous.
[32] *Re Heys*, *Walker* v. *Gaskill* [1914] P. 192.

conditions for jurisdiction of the court under section 1 of the Act may therefore be complied with.[33] Nevertheless any appeal to that jurisdiction must, it seems, be vain, since provision for a dependant, such as the widowed second wife, can only be made out of the testator's 'net estate'. That being defined (section 5) as the property of which the testator was free to dispose by his will, and the trust being binding over the whole or a substantial portion of the survivor's estate, it follows that there is no, or very little, property out of which provision could be made. It is difficult to conceive that the trust, being one which thus excludes the Act, would be held void as contrary to public policy, particularly where the parties to the mutual will are husband and wife. In such a case, the second marriage is not in contemplation when the arrangement is made and there is no deliberate attempt to evade the Act. Even if there were it seems doubtful if the policy of the Act is of such an overriding nature as to invalidate the disposition.[34]

The consequences of the trust are by no means limited to those of a testamentary character. Thus, once the trust has become binding, it should follow that the ultimate beneficiaries ought to have, during the life of the survivor, all the remedies appropriate to prevent the survivor breaking the trust, as by disposing of the property. The suggestion of Sir William Grant M.R.[35] that the testator's 'own interest and convenience' would afford sufficient security against dealings inconsistent with obligations to leave property by will, is too optimistic, since the realisation of the assets of the survivor and their investment in an annuity will both satisfy that convenience and defeat those obligations. In the case of contracts the courts have given remedies,[36] and Lord Camden's reasoning of good faith seems to require, as already indicated, that here too the beneficiaries should not be left unprotected. Once the trust of the survivor's estate is recognised its enforcement in this way seems inevitable. It should also follow from that recognition that, while purchasers without notice from the survivor will be protected, the possibilities of tracing within the limits of *Re Diplock*[37] must

[33] The fact that the will does not effectively dispose of property is here regarded as immaterial on the assumption that the Act is capable of application to partial intentions as it seems it is. See *Theobald on Wills*, 10th ed., p. 73.

[34] Thus in *Dillon* v. *Public Trustee of New Zealand* [1941] A.C. 294, Lord Simon upholds the effectiveness of dispositions *inter vivos*, and here we are concerned with a constituted trust not with a contract. That case therefore even if applicable to the English legislation does not govern this issue, the critical point here being not the extent of a liability but the non-existence of any estate belonging to the testator.

[35] *Fortescue* v. *Hannah* (1812) 19 Ves. 67.

[36] *Synge* v. *Synge* [1894] 1 Q.B. 466.

[37] *Re Diplock*, *Diplock* v. *Wintle* [1948] Ch. 465, affirmed in the House of Lords *sub nom. Ministry of Health* v. *Simpson* [1950] 2 All E.R. 1137. The principles are, however, more fully discussed in the Court of Appeal. Thus in the event of re-marriage by the surviving husband it seems the beneficiaries should be able to trace the wedding and engagement rings given to his second wife if provided out of capital. In practice it would seem that the remedy of

exist. Obviously this is only true of dispositions of capital rather than of accumulation from income, but the difficulties of distinguishing the two may be considerable.

Apart from the position as to alienations, the trust must also, if recognised, affect the survivor's position in other respects. Thus it seems to be arguable from the cases that the benefits under the first testator's will are testamentary, and those derived from the survivor are not. Hence the two funds may be differently regulated. To the former, the rule in *Howe* v. *Earl Dartmouth* [38] must in suitable cases apply, but not to the latter, being a trust created *inter vivos*.[39] Although there may therefore be no duty to invest the survivor's assets in trustee securities immediately, that duty will arise on any variation of investment, subject to any alteration of the general trust investment rules by the mutual will agreement.[40]

Of greater significance, perhaps, is the effect on the character of the survivor's estate ownership. Thus where as in *Re Green* land is under the agreement specifically devised in the mutual wills, the effect of cutting down the survivor's interest to one for life is to bring the land within the definition of settled land. The position would seem to be similar if on the survivor's death the land is together with his other estate to be held on trust for sale to provide legacies, or if the devise to the survivor by the first testator is, although *prima facie* absolute, in truth comprised in the arrangement. The result must be that dealings by the survivor, even if not interfered with by the beneficiaries, must be subject to section 13 of the Settled Land Act, 1925, and that the whole Settled Land Act machinery and limitations are brought into play.[41]

Conclusion.

Enough has been said to show that the consequences of mutual wills may be more far reaching than the testators intend. Clearly the possible consequences are not here exhausted. Thus the arrangement may, subject to the limits of section 42 of the Bankruptcy Act, 1914,[42] withdraw the assets of the survivor from his creditors. It may equally allow a wider scope to the concession in section 5 (2) of the Finance Act, 1894. Some of these consequences may be inconvenient, but not all, and the arrangement may, although cumbersome, have its uses. Thus it may be convenient

tracing might be the only effective one, since the beneficiaries, except in the case of a joint mutual will, may be ignorant of the circumstances leading to the creation of the trust until the death of the survivor.

38 (1802) 7 Ves. 137.

39 *Re Van Straubenzee*, *Boustead* v. *Cooper* [1901] 2 Ch. 779.

40 Trustee Act, 1925, ss. 3 and 4.

41 *Weston* v. *Henshaw* [1950] Ch. 510 gives a sufficient warning of the seriousness of this possibility.

42 Perhaps the most important limitation of this section is that it does not apply to the administration of estates on death.

where, as in *Re Hagger*, *supra*, two spouses have conducted a common business, or where two persons have contributed to a family pool of assets so that the separate property of each has ceased to be identifiable, as with two sisters who have been living together. In such cases an arrangement leading to mutual wills may seem a convenient device. Its adoption, however, involves a number of risks some of which have been indicated. To avoid them the greatest care must be taken in framing the governing agreement. In view of the few cases on the subject the conclusions which have been drawn can only be regarded as tentative but they are certainly possible since they seem to follow by necessary implication from the reported cases. In particular it is suggested that care must be taken in defining the scope of the trust of the survivor's property and his powers over the trust funds during his lifetime. The latter in particular is not an easy task, since, if the definition is too broadly drawn it will carry the arrangement outside the category of *Dufour* v. *Pereira* into that of *Re Oldham* and thus defeat the whole purpose. The difficulty may perhaps be adequately met by a sufficiently broad investment clause. By such definition of the position by the agreement many of the difficulties arising from the time of origin may be surmounted as also may be those which spring from the fact that, as the law now stands, the arrangement may restrict the survivor in his dealings with his own property more severely than the parties intended or desired. Thus provision should be made for such matters as re-marriage, the birth of posthumous children or disclaimer. If carefully drawn the arrangement may well serve a useful purpose while if this is not done it may simply give rise to numerous difficulties.

These difficulties really arise from the fact that the concept of mutual wills is an importation from the Civil Law and exists here without the background of community of property for which it was designed. Nevertheless it is a concept which has become well established in English law linked with the English institution of trust. Until it is shown that the courts are prepared to apply special rules to this particular trust it seems necessary for mutual testators to take considerable care over their arrangements.

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THE LAW GOVERNING CAPACITY WITH REGARD TO BILLS OF EXCHANGE

I.

In English law [1] the capacity to incur liability as a party to a bill [2] is co-extensive with capacity to contract. As far as English conflict rules are concerned, this general contractual capacity has in turn to be answered with regard to the proper law of the contract.

It will be submitted that in English law as well as in those systems which have incorporated the Uniform Law of bills of exchange and promissory notes,[3] the locus actus is the connecting factor for the determination of capacity. Despite this identity of construction, the result will differ according to the law applied to the determination of the locus actus. The locus contractus of a bill signed in Hamburg but delivered in London [4] is, according to English law,[5] England, but according to German law [6] Germany.

If the lex loci contractus could be determined in a uniform way acceptable to both English and Continental laws, an important step in the direction of the unification of conflict rules would have been made. In the present inquiry an analysis will be suggested making a uniform determination of the connecting factor—the locus actus—possible and with it the proper law of a contract on a bill. It is this law which according to English conflict rules governs capacity [7] and although the present article is confined to questions of capacity, the significance of the suggested analysis is not.

II. CAPACITY IN GENERAL

1. The Theories of Savigny and Story

The question as to the law to be applied for or against contractual capacity of the de cujus is by no means new.

[1] S. 22 (1), Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61).

[2] Where the primary classification of a document purporting to be a bill of exchange is concerned, the definition of s. 3 (1), B.E.A., will be applied. Moreover, 'when a bill issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may for the purpose of enforcing payment thereof, be treated as valid between all persons who negotiate, hold or become parties to it in the United Kingdom' (proviso (*b*) of s. 72, B.E.A.). S. 73 includes cheques in the definition of bills.

[3] Annex I to the Convention signed at Geneva, June 7, 1930, 143 League of Nations Treaty Series 257, No. 3313.

[4] *Haarbleicher* v. *Baerselman* (1914) 137 L.T.J. 564.

[5] S. 21, B.E.A.

[6] Now Articles 1 (point 7) and 2, German Bills of Exchange Statute of June 21, 1933, R.G.Bl. I, p. 399.

[7] See II, 1, *infra*.

Two different schools can be distinguished at a very early time. Those who hold that capacity is to be governed by the personal status of the person disposing of property and those who stress the law of the place of the transaction itself. A prominent proponent of the former view is Savigny who finds support for his views in the Continental codes. The latter view, of which Paul Voet could perhaps be called a forerunner, is held by Story and appears to be the basis of English law. It will, however, be shown that at the present time the personal status is not the main criterion of capacity in the Continental codes and it will also be submitted that even in English law the 'personal statute' cannot be entirely disregarded.

Von Savigny answers the question which law governs capacity to bind oneself in contract in the sense that the law of the contracting party's domicile governs the issue.[8] Thus, according to his view, a woman who according to the law of her domicile is incapacitated to undertake a suretyship (by virtue of the *S.C. Velleianum*) or a person standing under paternal power who according to the law of his domicile cannot, without his father's consent, contract a valid loan (by the *S.C. Macedonianum*), are so incapacitated all the world over.

Although adhering to this view even with regard to bills of exchange,[9] Savigny admits [10] that the legislator is justified in interfering because of the difficulties in ascertaining the various laws of domicile as well as the personal circumstances of the debtors on a bill.

Story holds that 'every person contracting in a country is understood to submit himself to the law of the place and silently to assent to its action upon his contract'.[11] 'The law of the place of the contract acts upon it, independently of any volitions of the parties, in virtue of the general sovereignty possessed by every nation to regulate all persons and property and transactions within its own territory.'[12]

Where, however, the contract has to be performed elsewhere, Story accepts as regards the validity of the contract the view of the *Digest*: *Contractum autem non utique eo loco intellegitur, quo negotium gestum sit; sed quo solvenda est pecunia* [13] and: *Contraxisse unusquisque in eo loco intellegitur, in quo ut solveret, se obligavit.*[14]

Two schools of thought are therefore to be reckoned with: one holding an almost immutable 'personal statute' to govern capacity.

[8] *A Treatise on the Conflict of Laws*, translated by W. Guthrie, Edinburgh and London, 1869, pp. 113, 137 and 195.
[9] P. 195, *op. cit.*
[10] P. 114, *op. cit.*
[11] *Commentaries on the Conflict of Laws, etc.* (8th ed.), Boston, 1883, p. 348.
[12] P. 349, *op. cit.*
[13] 42, 5, 3.
[14] 44, 7, 21.

the other contending that capacity is not an absolute thing, but has to be considered in connection with the transaction in question.

As far as English law is concerned, capacity can hardly be classified according to notions identifying capacity with status, but rather as a narrower conception concerning the validity of any given transaction of which capacity forms the basis. In the words of Lord Greene M.R. in *Baindail* v. *Baindail* [15]: ' . . . the courts in this country do for some purpose give effect to the law of the domicile as . . . imposing a particular status on a given person. It would be wrong to say that for all purposes the law of the domicile is necessarily conclusive as to capacity arising from status. . . . In the case of infants where different countries have different laws, it certainly is the view of high authority here that capacity to enter in England into an ordinary commercial contract is determined not by the law of the domicile but by the lex loci . . . there cannot be any hard and fast rule relating to the application of the law of the domicile as determining status and capacity for the purpose of transactions in this country '.

Apart from the statutory provisions of the Bills of Exchange Act and an isolated case [16] there is little authority on the question which law governs capacity to enter a contract on a bill of exchange.

2. The Independence of Contracts on a Bill

The Bills of Exchange Act asserts the independence of the contracts on a bill as far as capacity is concerned by providing that even ' where a bill is drawn or indorsed by an infant, minor or corporation having no capacity . . . to incur liability on a bill ', the holder is entitled to enforce it against any other party thereto.[17] Furthermore, ' The acceptor of a bill . . . is precluded from denying to a holder in due course [the drawer's] capacity . . . to draw the bill ' or to endorse it, or the capacity of a payee to endorse it.[18] Likewise, the drawer of a bill is precluded from denying to a holder in due course the capacity of the payee to endorse the bill and the endorser cannot set up the incapacity of the drawer or the previous endorser.[19]

Wherever a party to a bill is alleged to have lacked capacity, this does not affect the obligations of other parties to the bill. This independence of contractual capacity based on the statutory provisions just mentioned must be borne in mind whenever the proper law is being referred to. The application of one law means merely

[15] [1946] P. 123, 128.
[16] *Male* v. *Roberts* (1800) 3 Esp. 163; 170 E.R. 574.
[17] S. 22 (2), B.E.A
[18] S. 54 (2), B.E.A.
[19] S. 55, B.E.A. We are here not directly concerned with the question as to the law governing the operation of the provisions of ss. 54 (2) and 55, B.E.A., regarding the disabilities of the acceptor and drawer respectively. Suffice it to say that the analysis to be proposed for the determination of the connecting factor (see II, 4, *infra*) is here also applicable.

one law as regards one contract on a bill. There are, therefore, at least as many laws to be considered as there are different contracts on a bill.

3. The Choice of Law in General

The conflict rules contained in section 72, B.E.A., are not exhaustive. The saving of the rules of bankruptcy and of the common law including the law merchant in so far as they are compatible with the express provisions of the Act is founded on statutory provision[20] and judicial authority.[21] Reference to the common law, though fully justified, does not, however, yield sufficient material for the reliable determination of capacity in all cases, as there appear to be only one or two cases which can be regarded as authority.

The leading case is *Male* v. *Roberts*.[22] In this case Lord Eldon rejected the plea of the defendant infant that he lacked capacity according to the law of his domicile with these words: 'The law of the country where the contract arose, must govern the contract'.

Apart from the fact that the word 'arose' was not further explained—it is submitted that the lex loci contractus as well as the proper law are covered by this expression—nothing more can be concluded from this judgment than that as far as capacity is concerned, it is sufficient for the validity of the contract that according to the law of the place where the contract arose, the plea of incapacity cannot be accepted. Nothing in this case allows the conclusion that the lex loci contractus or the proper law of the contract govern the question of capacity exclusively. In other words, it was not decided that the law of the country where the contract arose would govern the question of capacity of a party if it were lacking according to that law.

The necessity to apply to a contract a law with which it has no substantial connection has been affirmed by the Privy Council decision in *Vita Food Products, Incorporated* v. *Unus Shipping Co., Ltd.*[23] Lord Wright held in this case that 'where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy'. Apart from the criticism levelled against this decision,[24] it remains questionable whether it can be applied to a choice of law for the determination of capacity regarding bills of exchange. It is submitted that a minor over twenty years of age cannot confer upon himself a capacity which he lacks under the

[20] S. 97, B.E.A.
[21] *Re Gillespie, ex p. Robarts* (1887) 18 Q.B.D. 286.
[22] (1800) 3 Esp. 163; 170 E.R. 574.
[23] [1939] A.C. 277.
[24] G. C. Cheshire (3rd ed.), Oxford, 1947, p. 334, and 56 L.Q.R. 320, and Falconbridge, *Essays*, Toronto, 1947, p. 547.

lex loci contractus and his domiciliary law merely by adding to his signature a clause to the effect that his contract should be governed by some other law, *e.g.*, by the Swiss Law of Obligations, Article 1086 of which would confer on such minor full capacity.

Dr. Kahn-Freund [25] recommends the application of the lex loci contractus to the question of capacity which he holds to be the proper law [26] ascertainable without ambiguity with reference to section 21, B.E.A. Falconbridge [27] also wishes the proper law to be applied. To this must be added that section 72, B.E.A., provides for the application of the law of delivery to formalities and ' what for these purposes is to be characterised as a matter of form is far from clear, the less so since in view of the strictly formal nature of these contracts the question of essential validity is apt to merge in that of formal validity '.[28] If we accept the view that capacity is merely part of the essential validity of the contract,[29] the application of one and the same law to questions of essential and formal validity would make superfluous a difficult classification of what constitutes one or the other.

If we follow the authorities mentioned, the law governing capacity of the parties to a bill in English domestic law is in the case of an acceptor the law of the place where notice has been given to the person entitled to the bill if this precedes delivery, otherwise and in the case of all other persons making a contract on a bill the law of the place where the instrument has been delivered.

This law will also, it is submitted, govern such questions as who can avoid a contract made by an incapax.[30]

4. A Uniform Method of Ascertaining the Connecting Factor

The acceptance of the proposition that, generally speaking, the law governing capacity is, in the municipal law of England, the lex loci contractus still leaves the question by which law this connecting factor should be determined.

Until recently [31] the connecting factor [32] was determined according to the rules of English internal law. In *De Reneville* v. *De Reneville*,[33] however, a case for the annulment of marriage, where for the decision of the preliminary issue, *viz.*, the jurisdiction of an English court, the question had to be decided whether the

[25] *Dicey* (6th ed.), London, 1949, p. 682.
[26] In view of s. 72 (1), B.E.A., by way of analogy.
[27] *Op. cit.*, p. 547, following Professor Cheshire's view.
[28] Dr. Kahn-Freund in *Dicey*, p. 685.
[29] *Baindail* v. *Baindail* [1946] P. 123. See II, 1, *supra*.
[30] Cf., *e.g.*, Art. 1125 (2), Code Civile.
[31] *Re Martin* [1900] P. 211; *Republica Guatemala* v. *Nunez* [1927] 1 K.B. 669; *Benaim* v. *De Bono* [1924] A.C. 514.
[32] In *Re Martin* the domicile of the testatrix the validity of whose will was at issue, in *Republica Guatemala* v. *Nunez* the place of assignment written by a Guatemalan depositor to a London bank.
[33] [1947] P. 168.

marriage was void or voidable, the court, although determining the terms 'void' and 'voidable' according to English law, decided the preliminary issue according to the laws of France.

While the desirability of an internationally uniform determination of the connecting factor and especially in matters here under discussion cannot be denied,[34] it is clear from a comparison of English law with other systems that there is by no means uniformity in the determination of the lex loci contractus.

Articles 263–273 of the Código Bustamente,[35] ratified by several Latin American countries, recognise the place of signature as governing the legal relations of the parties.

According to the laws of the countries that have incorporated in their systems the Uniform Law on bills of exchange and promissory notes [36] 'the simple signature of the drawee on the face of the bill constitutes an acceptance' [37] and 'the mere signature' of the avaliseur constitutes the aval.[38] Delivery is therefore not required to complete the contract on the bill. This view is also supported by the wording of Article 8 of the Uniform Law. From this it follows that in civil law systems the law of the place of signature is identical with the lex loci contractus, just as in English law—generally—the law of the place where the bill was delivered.[39] In countries which have adhered to the Geneva Convention [40] capacity is governed by the lex patriæ [41] or the lex loci contractus [42] whichever is the more favourable to the validity of the contract. The locus actus as the connecting factor for the determination of capacity according to the Geneva Convention is the place where the signature was given, according to English law, however, generally the place of delivery.[43] It is obvious that different results are obtained according to the law applied when determining the place where the contract was made. To obviate this unsatisfactory state of affairs, the following solution is suggested. It combines both principles and would provide a uniform result.

The proposed method requires that the connecting factor (*i.e.*, in our case the place where the contract was made) be determined

[34] Wengler (Die Vorfrage im Kollisionsrecht, *Rabels Z.*, 1934, p. 148) postulates as a requirement of justice the application of identical conflict rules to identical situations, no matter where they arise, so as to ensure an identity of attitude of parties whose legal relations are subject to these rules.

[35] Convention on Private International Law. Signed at Habana, February 20, 1928. 86 League of Nations Treaty Series 111, No. 1950.

[36] Annex I to the Convention providing a Uniform Law, etc., signed at Geneva, June 7, 1930, 143 League of Nations Treaty Series 257, No. 3313.

[37] Article 25.

[38] Article 31.

[39] S. 21, B.E.A.

[40] For the settlement of certain conflicts of laws, etc., of June 7, 1930, 143 League of Nations Treaty Series 317, No. 3314.

[41] Article 2 (1) of the Convention.

[42] Article 2 (2), Geneva Convention. In both cases there may be a reference to another law.

[43] S. 21, B.E.A.

in two stages. The first is the signing of the bill. If the law of the place of signature holds signature *generally* constituting the contract on the bill, it will also govern the question of capacity. This law may refer to the national law of the de cujus. The second stage is this: If the law of the place where the signature was given requires for the completion of the contract the delivery of the bill, the law of the place of delivery will govern capacity or—in the case of an acceptor—the law of the place where he gave notice of acceptance to the person entitled to the bill, if this notice precedes delivery. In other words: whenever a contract on a bill was signed in a foreign country, we have to consult the law of that country for the answer to the question: where was the contract made?

The case of *Haarbleicher* v. *Baerselman* already referred to [44] may support the suggested determination of the connecting factor (*i.e.*, the locus actus) in two stages as indicated.

The facts were these. The plaintiff firm of bill dealers and brokers, all members of which were British-born subjects, were indorsees of a bill of exchange. The bill had been drawn in Germany on July 20, 1914, for £1,000 for one month, endorsed to a Hamburg banker and by the latter to the plaintiffs and afterwards duly accepted by the defendant. The endorsement by the German banker bore the expression '*für mich*'. The defendant contended—and in this he was supported by a decision in a similar case given by the same judge a short time ago—that '*für mich*' meant 'for my use' and the endorsement was therefore restrictive within the meaning of section 35, B.E.A., giving the plaintiff no more right than the German banker would have had. The latter having become an alien enemy, was precluded from suing in an English court. Judgment was, however, given for the plaintiffs. It was held that according to section 72 (2), B.E.A., an endorsement was to be construed according to the law of the place where it was *made*. It was proved that in *German* law an endorsement '*für mich*' meaning 'instead of me' transferred the property in the bill and was not restrictive, but an open endorsement.

The judge could hardly have held the endorsement having been *made* in Germany, had he applied section 21, B.E.A. It is submitted that the above analysis provides the solution for the way in which this case was decided.

5. The Connecting Factor in English Law

(i) *Delivery by Post*

If we accept the application of the lex loci contractus determined in accordance with section 21, B.E.A., as governing capacity,[45] we have then to determine what, in English law, is to be taken as the place of delivery.

[44] I, *supra*.

[45] II, 3, *supra*.

In England the sender of a postal packet cannot reclaim it. Whenever, therefore, there is an express or implied authority [46] to send a bill by post, the bill is delivered in the moment of posting, and in countries where the sender has the right to reclaim a letter, delivery takes place the moment it leaves the town.[47] In both cases the law of the place where the bill was posted governs the capacity of the parties. In the absence of an implied authority to send the bill by post, delivery takes place at the moment of the actual handing over by the postman to the person entitled to the bill.[48]

Let us suppose that in the latter case (where there was no authority to send the bill by post) an English domiciled British minor over twenty years of age signs the bill (which is not in consideration of necessaries) and sends it to the person entitled to it—a Swiss national—to Switzerland. Can the defence of minority be upheld? The answer seems to be in the affirmative, whether English domestic law is applied or that law which a court of the locus contractus (Switzerland) would apply.

In *Re Soltykoff* [49] it was held that capacity to accept a bill in England is governed by English law and a minor who—as the case would suggest—in the place of his domicile would, according to the law obtaining there, be of full capacity [50] is not so in England. Lord Esher held [51]: ' . . . an infant cannot make himself liable upon any contract whatever, except a contract for the supply of necessaries. . . . He is not liable upon a bill of exchange or a promissory note *under any circumstances* '.

It is submitted that we reach the same result if we apply the law which a court in Switzerland would (presumably) apply. It would probably hold that as the bill was executed in England. English law has to be applied. The lex loci contractus being in English law Switzerland, Swiss law applies together with its conflict rules. According to Swiss law the contract in question was made in England by a person who under his national law is a minor and lacks in the circumstances of the case capacity under the law which is alternatively applicable as lex patriæ or loci contractus.

(ii) *Constructive Delivery*

Until now it has been assumed that the bill after having been signed by one party was delivered to the other or at his direction

[46] What constitutes authority has to be decided on the merits of each case: MacKinnon J. in *Ose Gesellschaft, etc.* v. *Jewish Colonial Trust* (1927) 43 T.L.R. 398.
[47] *Per* Sir G. Mellish L.J. in *Ex p. Cote; re Deveze* (1873) L.R. 9 Ch.D. 27, 32.
[48] *Pennington* v. *Crossley & Sons, Ltd.* (1897) 13 T.L.R. 513.
[49] [1891] 1 Q.B. 413.
[50] The defence of an English domiciled minor who only according to a foreign law would be of full capacity is stronger still.
[51] At p. 415.

to a third party either inter presentes or by post. Situations may, however, arise where the bill before and after signature remains with one and the same person. The question then arises as to the time and place of the completion of the contract. The time is only of importance in so far as it permits the determination of the place of delivery.

Where the drawee gives notice of his acceptance to or according to the directions of the person entitled to the bill, acceptance is complete without delivery. In all other cases delivery is required to complete the contract.[52] '"Delivery" means transfer of possession, *actual or constructive*, from one person to another.'[53] The words printed here in italics exclude doubts as to the possibility of transfer by traditio brevi manu, constitutum possessorium, or cessio vindicationis (attornment).

Where the drawer of a bill or the maker of a promissory note after signature leaves the document with his agent, this does not constitute delivery as required by section 21 (1), B.E.A.

In *Brind* v. *Hampshire*[54] the defendant agent of the endorser of a bill had received it from him endorsed to the plaintiff with a direction to hand it over to the plaintiff endorsee. Before he actually handed it to the plaintiff, but after he had advised him of his intention to do so, the defendant's principal countermanded his order and the defendant refused to hand over the bill. Held, that mere notice to the plaintiff did not create any obligation to hand over the bill. The possession of the bill remained in the endorser and the endorsee could not succeed in trover.

Supposing the principal wishes to pay his agent with the bill which the latter is holding on his behalf. Has delivery taken place when the principal notifies his agent of his new directions or—relating back—when he gave him the bill, perhaps in another country?

It is submitted that there was no delivery before notification of the agent. Supposing a person under incapacity leaves a bill signed by himself with someone acting as his agent. After gaining capacity he directs him to keep the bill for his own use. It is submitted that delivery must be taken as having been effected when and where the later direction to the agent was given. Before that moment possession remained constructively in the transferor, after that moment, however, there is no reason to hold the contract void on the ground that at the time of the physical transfer there was no

[52] S. 21, B.E.A.

[53] S. 2, B.E.A. The Sales of Goods Act, 1893, defines delivery in s. 62 as 'voluntary transfer of possession from one person to another' which may import a confusion whether this means passing of title or transfer of possession. (*Benjamin on Sale*, London, 1931, pp. 219 and 711.) In the law relating to bills of exchange the problem that the transfer of title could be not simultaneous with the transfer of possession does not arise.

[54] (1836) 1 M. & W. 365, 150 E.R. 475.

capacity and therefore no valid delivery. This is the case of brevi manu traditio.

A decision on the converse situation, *i.e.*, on the constitutum possessorium, is *Lysaght* v. *Bryant*.[55] In this case the plaintiff's son was partner in a firm indebted to his father. With the concurrence of his only partner the son, in the firm's name, endorsed the defendant's bill to the plaintiff, but held the bill as the latter's agent without informing him of the endorsement. Creswell J. said[56]: 'Mere writing on the back of the bill is not enough to constitute an endorsement; there must be a delivery, *or something equivalent to delivery* of the bill to the endorsee' and it was held by the court that holding by the plaintiff's agent on the plaintiff's behalf was sufficient for the completion of the endorsement. This question had in the first place been left to the jury and it seems that in similar cases the moment of constructive delivery will be a question of fact. From the time of this delivery its place will become apparent.

The rules laid down in *Brind* v. *Hampshire* and *Lysaght* v. *Bryant* have been saved by the provisions of section 97 (2), B.E.A., and re-enacted in section 2, B.E.A.

Where a foreign law is applicable to the transfer, the position will be similar. French, Austrian, German, Swiss, and other laws provide likewise for the possibility of constructive delivery.[57]

III. SPECIAL CASES OF INCAPACITY

1. Minors

Apart from *Re Soltykoff*[58] where a person was held to lack capacity under any circumstances before his twenty-first birthday, there is no decision on the defence of minority of any such person who according to his lex domicilii is of full capacity. Writers usually concede such defence,[59] although Professor Wolff[60] and now also Professor Cheshire[61] deny it. Professor Wolff gives two convincing reasons for his views, against which there appears to be

[55] (1850) 9 C.B. 46, 137 E.R. 808.
[56] At p. 52.
[57] Article 1606 Code Civil.—§ 428 A.B.G.B. (*traditio brevi manu*, *Besitzauflassung* and *constitutum possessorium*, *Besitzauftrag*). For *cesso vindicationis* (*Besitzanweisung*) see Vienna Supreme Court decision No. 1888/1918 quoted by Ehrenzweig, System, Vienna 1923, 1/2, p. 78.—§§ 929, II B.G.B. (*brevi manu traditio*), 930 (*constitutum possessorium*), and 931 (*cessio vindicationis*).—Article 924 (1) Law of Obligations.
[58] [1891] 1 Q.B. 413, *supra* II, 5 (i). The report is short and the fact that the minor was of full capacity according to his own lex domicilii can only be inferred.
[59] Cheshire, *Private International Law*, Oxford, 1947, p. 266; Falconbridge, *Essays*, Toronto, 1947, pp. 324 and 547; Dr. Kahn-Freund in *Dicey*, p. 622; Schmitthoff, *Conflict of Laws*, London 1948, p. 112.
[60] Martin Wolff, *Private International Law*, Oxford, 1945, p. 288.
[61] *International Contracts*, Glasgow, 1948, p. 51.

hardly any authority. First, a person pleading minority according to English law does not require its protection which he does not enjoy according to his own law. Second, such protection has to be granted at the expense of the English party to the contract.

An Englishman contracting in England is protected against concluding a nugatory contract with an alien lacking capacity (according to his own national or domiciliary law) by the cogent application of the proper law to the question of capacity.

The question whether not only capacity but also the lack of it should be governed by the same law can, it is submitted, be only answered with due regard to the interests to be protected. Can, apart from the wish for uniformity, any reason be advanced why a person who by his own lex patriæ or domicilii is considered to be of full capacity, should, whenever his contracts are governed by English law, be granted a protection which in the normal course of events he never enjoyed, a protection which amounts to a privilege against the English partner to the transaction?

Without being strictly followed, French or Italian [62] law could provide a guidance. Faced with the choice between the two conflicting principles of the stability of status and the security of the transaction, French law has decided in favour of the former. The difficulty of acquiring the knowledge of a status governed by a foreign law is solved just as in English law: foreign law is to the Frenchman a question of fact and the maxim '*nemo censetur ignorare jus*' is not applicable. A contract governed by French law is not invalidated by the disability of the foreigner who contracted with the Frenchman, if only the latter with respect to this disability flowing from a foreign law acted with due diligence, that is to say, '*sans légèreté, sans imprudence, et avec bonne foi*'.[63] English law has spared Englishmen the necessity of making inquiries into a foreign status and its incidents with due diligence. In fact, they need not make any inquiries at all. But why should they be penalised by making such inquiries fruitless?

In English law [64] a contract not for necessaries entered into by an infant cannot be ratified by him after his coming of age. This rule is, however, by no means of universal application. In some foreign laws the infant acceptor of a bill may validly ratify his acceptance after coming of age.[65] There appears to be no plausible reason for not extending Professor Wolff's view and letting the law most favourable to the validity of the contract govern the issue, provided, of course, that law has a reasonable connection with the transaction in question.

[62] Codice Civile of March 16, 1942, Article 17, and cf. Article 3, III Code Civil.
[63] Henry Battifol, *Les Conflits de Lois en Matière de Contrats*, Paris, 1938, p. 330, quoting the case *Lizardi*, 16.1.1861, Dalloz 61.1.193, S. 61.1.305.
[64] Infants Relief Act, 1874, s. 2.
[65] For Austrian and Czech law see Ehrenzweig, *System I/1*, Vienna, 1925, p. 205.

2. Married Women

Similar considerations to those discussed in the preceding section apply to the question whether a married woman who lacks capacity by virtue of the discriminatory character of the lex loci contractus should be permitted to plead this incapacity, if her own lex domicilii does not know of any such discrimination.

There appears to be no English decision on this point, but in a Saskatchewan case [66] a promissory note made by a woman of full capacity by her own domiciliary law which was also the lex fori (Saskatchewan) was held void, as it was made payable in Florida for the sale of land there situated and she lacked capacity under the law of Florida. The reasoning of the court [67] which seems to have been influenced by the fact that the note was in payment for land, has not yet been adopted by the English courts. Moreover, even if this *ratio* should become part of English law, it would still be possible to distinguish from the quoted case any other where a bill was not given for the sale of land in a place where the person paying with the bill would lack capacity.

3. Lunatics

In English law the fact that a person pleading incapacity can prove his insanity at the time of the conclusion of the contract is not sufficient to substantiate this plea. A contract with an insane person is merely voidable and only if 'the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about'.[68] The plea does not, therefore, avail against a holder in due course.

Thus, in English law the state of mind of the person with whom the insane party contracted is of decisive importance for the validity of the contract. In the case of a contract with a minor, however, the state of mind of the other party to the contract is of no consequence whatever. Compared with most other systems, English law is in a unique position. We have seen that, *e.g.*, French law imposes a particular duty on anyone contracting with a minor; likewise, the rule in *Imperial Loan Company, Ltd.* v. *Stone* is not necessarily applicable in other systems. Czechoslovak and Austrian law,[69] *e.g.*, provide for the absolute contractual incapacity of lunatics. They cannot even accept gifts and contracts purporting to have been made with them are void and cannot be

[66] *Bondholders Securities Corporation* v. *Manville* [1933] 4 D.L.R. 699; [1933] W.W.R. 1.

[67] Turgeon J.A. after reviewing the authorities held (at p. 705): 'On the whole I am of opinion that, at least in the case of mercantile contracts not prohibited by the lex fori, the weight of authority is to the effect that the capacity *or incapacity* of a person to contract must be determined by the law of the country where the contract arises'.

[68] Lord Esher M.R. in *Imperial Loan Co., Ltd.* v. *Stone* [1892] 1 Q.B. 599, 601.

[69] § 865, A.B.G.B.

ratified. The mere interdiction has the same effect and there is no possibility of acknowledgment or validation of the contract by proof of sanity at the time the contract was made.[70]

In his textbook [71] Professor Cheshire suggests that the effect of lunacy should not be governed by the lex domicilii but by the proper law of the contract. To this may be added Roberton's view [72] that the question whether something relates to capacity or formalities is a matter of secondary classification to be performed by the proper law. This law can be ascertained in the way already suggested.[73]

4. Incapacity under a Foreign Penal Law

A plea of incapacity cannot be sustained by the provisions of a foreign penal law. Notwithstanding the classification of the law in question by the foreign system, the lex fori decides exclusively whether a law is penal in character.

The authority for this is the case of *Huntington* v. *Attrill*.[74] There the creditor of a company had sued and obtained judgment in New York under a New York statute which provided that company directors should be personally liable on proof that false reports of the financial condition of the company had been published. The New York court had characterised the statute as penal. The plaintiff sued on the judgment in Ontario. On appeal to the Privy Council the Board advised that the statute was remedial in character and that it was for the Ontario court to put its own interpretation on the statute.

Once an incapacity is founded on provisions of a foreign law which are proved to the satisfaction of the English court to be penal in character, there can be no doubt as to their purely territorial nature.[75] Examples of persons whose disability by a foreign penal law will not be recognised by an English court are: deserters and prodigals.

In Czechoslovak law [76] a deserter while at large cannot acquire or transfer anything whatsoever under any title and the sentence declaring the de cujus a deserter is accepted by any Czechoslovak court as conclusive evidence of that status for the period to which the sentence relates. It need hardly be stressed that apart from the strictly territorial nature of the provision in question, a foreign adjective law has no binding force in England.

[70] Case quoted by Ehrenzweig, *op. cit.*, p. 204, who criticises English law on this point.
[71] P. 543.
[72] A. H. Robertson, *Characterisation in the Conflict of Laws*, Harvard, 1940, pp. 46 and 47.
[73] II, 4, *supra*.
[74] [1893] A.C. 150.
[75] Cf. *Banco de Vizcaya* v. *Don Alfonso de Borbón y Austria* [1935] 1 K.B. 140.
[76] § 208, Military Criminal Code.

Whatever the proper law has to say on the matter, no English court will recognise any incapacity resulting from prodigality, a status known to more than one European code.

In *Worms* v. *De Valdor*[77] a French prodigal, acceptor of certain bills sued for their delivery up and cancellation. On the plea that he could not sue without the intervention of his *conseil judiciaire* it was held that the disqualification was penal in character and had therefore to be disregarded.

IV. CORPORATIONS

The differences between conflict rules in various systems regarding the capacity of natural persons depends on the one hand on the treatment of these persons in the different municipal laws, and on the other on those considerations to which reference has been made previously. It appears that the theories with regard to capacity propounded by Savigny and Story were not intended to apply to corporations and need not therefore be further explored here. The different treatment in various municipal laws of natural persons can be explained by the existence of different social conditions in the countries concerned, such as the nature and extent of the paternal power, the relations between husband and wife, etc. These conditions in turn have been and are still being influenced by conditions or considerations of a political or economic nature which the law cannot ignore. The ' outlawry ' of a deserter is the consequence of the exceptional powers enjoyed by the executive, the civil death of a person in Holy Orders of powers enjoyed by the Church. For reasons of an economic nature, *viz.*, the facilitating of commerce, a person over twenty-one years of age is in England and most other countries considered of full capacity. English law in pursuit of the security of the transaction does not expect anyone dealing with such a person to inquire into his status according to rules which are perhaps ascertainable only with difficulty. The absence of large fortunes which usually require protection against dispositions by improvident young persons, may be an explanation why in some countries the age limit for capacity is fixed at a lower level.

None of these considerations arises in the case of corporations. The nature and extent of business transacted by these bodies makes it desirable that anyone dealing with them can and must be expected to familiarise himself with the law governing the constitution of such corporation.

Writers agree[78] that the powers of corporations should be governed by the law to which they owe their existence and enjoy universal recognition. If we accept this view, then any difference

[77] (1880) 49 L.J.Ch. 261; 28 W.R. 346.

[78] Joseph H. Beale, *A Treatise on the Conflict of Laws*, New York, 1925, p. 785; Ernst Rabel, *The Conflict of Laws*, Chicago, 1947, Vol. 2, p. 159.

in the conflict rules of various systems cannot be justified by any consideration short of the public policy of the system concerned.

The question of a corporation's capacity may, however, involve more than one problem. The existence of the body itself may be at issue; secondly, a plea of ultra vires may be set up which corresponds to one of a natural person's incapacity; or thirdly, that the person who issued the bill lacked authority under the constitution of the corporation. Strictly speaking, only a plea of ultra vires involves a question of capacity.

1. Defunct Foreign Corporations

A foreign corporation which by virtue of the law to which it owes its existence has become extinct before proceedings have been started in England, is usually treated as non-existent.

Thus, in *Lazard Bros. & Co.* v. *Midland Bank*[79] the appellants, creditors of a Russian bank, had obtained a garnishee order nisi against the defendants. As a consequence of the bolshevik revolution the Russian bank had ceased to exist and one of the points raised in the appeal to the House of Lords was whether the order nisi should be set aside on the ground that the judgment was a nullity, having been given against a party which had ceased to exist before the date of the writ. This question was answered in the affirmative by a unanimous decision of the House. Lord Wright said in his judgment[80]: 'English courts have . . . recognised as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. . . . But as the creation depends on the act of the foreign State which created them, the annulment of the act of creation by the same power will involve the dissolution and non-existence in the eyes of English law. The will of the sovereign authority which created it can also destroy it. English law will equally recognise the one as the other fact'.

Following this reasoning Lord Russell of Killowen, in his dissenting judgment in *Russian & English Bank* v. *Baring Bros. & Co., Ltd.*,[81] characterised the suit of a Russian company which had been dissolved as a consequence of the October revolution thus: 'The defendants are in effect being sued by an English translation of the name of a dissolved Russian corporation—a nominis umbra indeed'.

English courts recognise the status or the lack of it of foreign corporations by referring to the law to which these corporations owe their existence. The interests of creditors of a defunct foreign corporation have, however, made an important exception to this rule essential. These creditors may have an interest in proving claims against the corporation. It is also in their interest that the

[79] [1933] A.C. 289.
[80] At p. 297.
[81] [1936] A.C. 405, 435

corporation should, in turn, be able to sue its debtors. Statutory provisions meet this case; according to section 400 of the Companies Act, 1948—'Where a company incorporated outside Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this Part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated'.

Thus, in *Russian & English Bank* v. *Baring Bros. & Co., Ltd.*,[82] it was held by a three to two majority in the House of Lords that a foreign company dissolved in the country of incorporation may, where the provisions of the Companies Act just referred to apply, bring an action to recover sums due at the date of dissolution. Likewise, in *Dairen Kisen Kabushiki Kaisha and Others* v. *Shiang Kee, etc.*,[83] the Privy Council advised that the Hong Kong Supreme Court was empowered to order the winding up of a company registered in China with a branch in the colony after the Chinese courts had decreed the company's dissolution. The Board based their decision expressly on the provisions of the Companies Ordinance No. 39 of 1932, a re-enactment of section 400 of the Companies Act.

2. The Defence of Ultra Vires

A plea of ultra vires implies that the organs of a corporation went beyond the powers vested in the corporation. Whenever a contract is ultra vires, there is no possibility of ratification notwithstanding any rights which may obtain against the corporation's organs who exceeded the corporation's powers.

We are here concerned with an ultra vires plea by an English corporation[84] only in so far as an English court will probably characterise the nature of a foreign corporation's capacity according to notions derived from a comparison between the foreign law in question and the lex fori.

Foreign laws, like English law, distinguish between corporations and partnerships. As a partnership is in many systems not a legal person, the question arises how to classify the nature and validity of the accretion of a right or liability to a partnership. Professor Neuner[85] suggests the re-classification of the transaction in question and holds that an assignment made to a partnership has to be taken as having been made to each partner individually.

[82] [1936] A.C. 405. [83] [1941] A.C. 373.

[84] For the position under the Companies Act, 1862: *The Directors, etc., of the Ashbury Railway Carriage & Iron Co. (Ltd.)* v. *Hector Riche* (1875) 7 H.L. 655. For companies created by Act of Parliament: *Baroness Wenlock* v. *River Dee Co.* (1887) 36 Ch.D. 674. By s. 5 of the Companies Acts, 1947 and 1948, a company may by special resolution alter the provisions of its memorandum with respect to its objects.

[85] Robert Neuner, 'Die Anknüpfung im Internationalprivatrecht' in (1934) *Rabels Z.* 81, p. 107. It is submitted that the case of a *Kommanditgesellschaft* would also call for the appropriate secondary classification.

The powers of a foreign corporation may vary according to the law of the corporation. As a rule, commercial associations do not suffer under any incapacities. Where, however, companies are incorporated in more than one country—*e.g.*, in more than one State of the Union—an act may be intra vires according to one charter, but not according to another. Henry E. Foley [86] advocates in such cases holding the transaction intra vires: 'The defence of ultra vires rests mainly upon the policy of protecting stockholders and intra vires creditors, and such persons must certainly contemplate that the association will engage in acts authorised by any of its charters'.

Where an association's powers are limited, as *e.g.*, in the case of a *Verein* [87] or a *Stiftung*, these limitations ought to be respected.

3. Lack of Authority

Where an act was done in the name of a corporation by a person who had no authority to do this particular act, such act, though intra vires, does not bind the corporation. The possibility of subsequent ratification distinguishes a plea of lack of authority from one of ultra vires. The onus of proof of authority is, in the main, on the party relying on it. Thus, in *Dickinson* v. *Valpy* [88] the plaintiff holder in due course failed in his suit against a mining company on a bill endorsed on its behalf by a partner whose authority the plaintiff did not prove.

Similarly, in *Re Cunningham & Co., Ltd., Simpson's Claim*,[89] a claim in the winding-up proceedings against a company upon a promissory note given to the claimant as security by the manager of the company was disallowed because it was found that the manager whose powers were 'to take the entire charge of the interests of the company' in South America, had not acted in the ordinary course of business, but had made an abnormal and unjustified transaction.

From the nature of the company's business authority may, however, be implied and where by the company's articles of association general authority is given subject to certain formalities, the party dealing with a person or persons purporting to act by virtue of such authority has against the corporation on whose behalf these persons act the right to assume *omnia rite esse acta*.

Thus, in the leading case of *The Royal British Bank* v. *Turquand* [90] it was held that the defendant company was bound

[86] (1929) 42 Harvard L.R. 516: 'Incorporation, Multiple Corporations and the Conflict of Laws', at p. 583.

[87] Ehrenzweig (*op. cit.*, I/1, p. 193) quotes a decision of the Vienna Supreme Court who held the wholesale purchase of coal by an association (*Verein*) of coal merchants ultra vires of the association the rules of which empowered it only to act for the protection of the professional interests of its members.

[88] (1829) 10 B. & C. 128, 109 E.R. 399.

[89] (1887) 36 Ch.D. 532.

[90] (1856) 6 El. & Bl. 327, 119 E.R. 886.

by bonds sealed with its common seal and issued by the directors who by its deed of settlement were authorised to issue bills, notes and mortgages and borrow on bond such sums as should by a general resolution of the company be authorised. It was further held that no one dealing with a company (but not with a partnership) needed to do more than read the statutes and the deed of settlement and that there was a right to infer against the company that the authorising resolution to which the settlement referred, had in fact been passed.

This decision was followed in *Dey* v. *Pullinger Engineering Company* [91] where the plaintiff holder in due course succeeded in his suit against a company whose director had drawn the bill sued on. The company's articles of association empowered the directors to appoint one of their number managing director with all powers they should think fit, but the director who had issued the bill, although having been created managing director, had never been authorised to draw bills.

This right to assume against the company that all matters of internal management in the way indicated have been complied with is not an absolute one. It cannot be claimed by a plaintiff suing on an act which would ordinarily be beyond the powers of the organ concerned. Nor does this right exist where the contract on the bill is a forgery.[92] This appears to be the consequence of the provisions of section 24, B.E.A., and was so held in *Houghton & Co.* v. *Nothard, Lowe & Wills, Ltd.*,[93] and in *Kreditbank Cassel G.m.b.H.* v. *Schenkers, Ltd.*[94] The provisions of section 24, B.E.A., and the *ratio* of the two cases are, however, only applicable to contracts on bills made in England. A contract made in a foreign country (*e.g.*, *Austria*) where a forged endorsement is not necessarily fatal to the claim of a holder in due course [95] has to be judged according to the foreign law.

V. DIPLOMATIC PRIVILEGES—ENEMY STATUS

The impossibility of suing a foreign sovereign, ambassador or other person enjoying diplomatic privileges in an English court without prior submission to the jurisdiction having been obtained, is procedural and not founded on incapacity.

Likewise, the disability of an alien enemy to sue is procedural, while the fact that a contract with him is void is based on illegality.

Hugo Fischer.*

[91] [1921] 1 K.B. 77.
[92] Within the meaning of s. 1, Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), as extended by s. 35, Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86).
[93] [1927] 1 K.B. 246; [1928] A.C. 1.
[94] [1927] 1 K.B. 826. Cf. *British Thomson-Houston Co., Ltd.* v. *Federated European Bank, Ltd.* [1932] 2 K.B. 176 and Mr. W. H. Griffith's comment on p. 183.
[95] Cf. *Embiricos* v. *Anglo-Austrian Bank* [1905] 1 K.B. 677.

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EVIDENCE AND PROCEDURE IN SCOTLAND: A COMPARISON WITH ENGLAND

All ordinary civil litigation in Scotland takes place either in the Court of Session in Edinburgh or in one of the Sheriff Courts scattered throughout the country. The civil jurisdiction of Justice of the Peace Courts does not exceed £5 and is not very much resorted to. The Court of Session has jurisdiction over the whole of Scotland and its inhabitants, but the jurisdiction of each Sheriff Court is limited for the most part to the confines of the sheriffdom in which it is situated.

The Court of Session is composed of not less than thirteen or more than fifteen judges (at the moment there are fourteen). The Inner House of the Court of Session is in the main an appellate court, at any rate, so far as ordinary actions are concerned. It sits in two divisions of four judges each, known respectively as the First Division and the Second Division of the Court of Session. The two divisions have co-ordinate jurisdiction and possess equal authority. There is in most cases an appeal from the Inner House of the Court of Session to the House of Lords. The remaining judges are referred to as Outer House judges or Lords Ordinary. They sit separately. They are judges of first instance and have co-ordinate jurisdiction. The Court of Session has only one central office. There is in Scotland no equivalent to the English District Registries nor are there in Scotland anything resembling English Masters or District Registrars.

The Sheriff-Substitute is the local judge of first instance. In the less populous districts, a Sheriff-Substitute presides in more than one court, but in the larger centres of population, more than one Sheriff-Substitute is allotted to each court. The civil jurisdiction of a sheriff is not limited as regards the value of the subject-matter in dispute, as the jurisdiction of the county court judge in England is limited, but in practice, actions involving large sums of money tend to be raised in the Court of Session. The Sheriff-Principal is not, except in Edinburgh and Glasgow, a resident judge, but a member of the Bar in Edinburgh who visits the sheriffdom to carry out various administrative duties and hear appeals from judgments of the Sheriff-Substitute. In all such cases an appeal also lies direct from the judgment of the Sheriff-Substitute to the Court of Session. In popular parlance no distinction is maintained, both officials being referred to as 'the sheriff'. Moreover, when the word 'sheriff' appears in a

statute, it almost invariably refers in practice to the judge ordinary of the sheriffdom, *i.e.*, the Sheriff-Substitute.

Both the judges of the Court of Session and the Sheriffs-Substitute have important criminal jurisdiction, with which, however, we are not here concerned.

The legal profession in Scotland is divided as in England, into two branches—advocates (the equivalent of barristers) and solicitors. (To complicate matters, solicitors in Aberdeen, but in Aberdeen only, are called advocates.) As the Court of Session always sits in Edinburgh, practising advocates, properly so called, (*i.e.*, barristers) invariably live in Edinburgh as they practise mainly in the Court of Session and papers are delivered to their houses. Advocates are not like English barristers attached to circuits, but they have the right to appear before any of the courts in Scotland, and they do occasionally plead in the Sheriff Courts. It is possible for a party to conduct a litigation in person, but the assistance of a member of the legal profession is necessary and usual, except in the case of the defender in an action where written pleadings are not required.

The writ which inaugurates an action is known as a ' Summons ' in the Court of Session and an ' Initial Writ ' in the Sheriff Court. The form of summons or initial writ used varies very little, whatever the remedy may be which is being sought. The English lawyer with a history of forms of action behind him, no doubt finds it difficult to appreciate how the Scottish lawyer manages to use the same form of writ for all ordinary actions, but the Scottish lawyer finds no difficulty in doing so and has, in fact, done so for centuries. Indeed, as far back as the thirteenth century, when the writ system was developing in England, differentiation of writs may have been avoided in Scotland, by the use of something equivalent to the querela sine brevi, which although known in England, does not appear to have been used much there. Both the summons and the initial writ consist of three parts. The first part contains the full names, designations, occupations and addresses of the parties and the nature of the decree which the pursuer seeks. In the vast number of cases the decree which the pursuer seeks is payment of a fixed sum of money with interest thereon. In Scotland the amount of damages claimed must always be specified, but there are various decrees which pursuers may ask for other than decrees for payment of money, *e.g.*, eviction of a tenant, declaration of a boundary, interdict of a nuisance, etc.

The second part of the summons or initial writ is known as ' the condescendence '. This is the statement of facts upon which the pursuer founds his claim and must be set out in separate articulate paragraphs, which should be numbered consecutively. In Scotland, unless the pursuer's claim is under £20 in value, he must make a fairly detailed written statement of the facts on

which he bases his claim before he obtains a warrant to cite his adversary to appear before the court. The English plaintiff need only prepare a writ and general indorsement before the writ is issued and the first document which the English defendant receives is thus much less specific than the first document which a Scottish defender receives. The English writ is certainly much less cumbersome than the Scottish summons. To prepare a writ and general indorsement an English solicitor or counsel requires much less detailed instruction than the Scottish solicitor or counsel requires to prepare a summons with condescendence and pleas-in-law. For the former a short telephone call, without the assistance of a shorthand typist would suffice, but for the latter an interview or, at any rate, a long telephone call with a shorthand typist at hand would be necessary. It is, in the vast majority of cases an advantage to be able to initiate legal proceedings on the spur of the moment by merely lifting the telephone and speaking into it for a moment or two, *e.g.*, where an undisputed debt is in question, but there are dangers in such a facility from which the Scottish litigant, with his more cumbersome procedure may be saved at times. The English defendant's first reaction to the cryptic writ may be to consult his lawyer. It is not claimed that the Scottish summons is any less cryptic to the layman than the English writ, but the Scottish summons, at any rate, gives the defender at once a fairly full statement of what he is up against and may, if he has a poor case, induce an earlier settlement than its English counterpart.

The third part of the summons or initial writ is the pleas-in-law. This is a statement of the legal proposition or propositions under which the pursuer maintains that he is entitled to the remedy which he seeks. These legal propositions, if there be more than one, should also be numbered consecutively.

The usual method of citation in the Court of Session is to transmit to the defender, by registered post, a copy of the summons which has been impressed with the court stamp. (This is known as ' passing the signet '.) The condescendence, pleas-in-law and a schedule of citation are attached. In the case of a Sheriff Court action, the initial writ does not pass the signet, but is presented to the sheriff clerk, who appends a warrant of citation. Instead of posting the summons or initial writ, it may be delivered by a duly qualified messenger and witness (personal service), or the defender's solicitor may accept service on his behalf. Postal service is almost universal, where the defender's solicitor does not accept service. It is simpler than personal service and has proved quite satisfactory in Scotland, where it has been competent since 1882 and has been regularly practised now for many years. It is certainly not so embarrassing to the defender as personal service.

Although Scottish practice is simpler than English as regards service of the writ on the defender, unfortunately if a party intends

to defend an action, he cannot intimate this fact to the court and to the other side by post, as he can do in the English county court. In the Court of Session, the party who intends to defend an action must instruct a solicitor to mark on the margin of the printed calling list, kept in the office of the court, the name of his solicitor and counsel. This is known as entering appearance and must be done not later than the day after the day on which the case appears on the calling lists. In Scotland when a defender is served with a summons or initial writ he has as a rule no course open to him but to appear in the ordinary form or not to do so. He has not as in England various ways of entering appearance. In the Sheriff Court there are no calling lists. In an ordinary Sheriff Court action (over £50) appearance is entered by lodging in court a formal notice of appearance within the induciæ. In a summary action (over £20 but not over £50) and in a small debt action (not over £20) the defender appears physically in court, either in person or by his solicitor on the first court day after the induciæ have expired. Where appearance is not entered in the prescribed manner, decree in absence is granted.

When an action in the English High Court is defended, further procedure is frequently laid down by a Master in Chambers, but the practice of holding hearings in chambers before a judge or master is rarely followed in Scotland, and, indeed, is not competent in an ordinary action. It was provided for in the summary trial proceedings introduced in 1933, which resemble arbitration proceedings before a Lord Ordinary and are available for settling almost any type of dispute. This procedure is, however, applicable only when both parties consent to make use of it, and it has not in fact been used much in practice. In 1868 a Clerks Motion Roll was established in the Court of Session in an effort to introduce into Scotland something analogous to the hearing of motions by a Master in Chambers, but it was found to be impracticable and was abandoned. Indeed, it seems odd to a Scottish lawyer that the first step in an English litigation should be to ask a Master for directions. While the variety of topics about which one may argue is limitless, there is not the same variety of ways in which one may profitably argue about these topics and the Scottish lawyer does not seem to feel the same need for varying the procedure as the English lawyer does. In the taking of accounts and making of inquiries the English chamber jurisdiction is more efficient and less expensive than the court procedure to the same end in Scotland, but much of the work done by Masters in Chambers is the ordering of affidavits which are not, as a rule, competent in Scotland. Discovery of documents, mode of trial and evidence on commission are dealt with by the Lord Ordinary in open court on the Motion Roll. As for some of the other matters dealt with by Masters and District Registrars, the Keeper of the Rolls fixes the place of the proof or trial, and in addition, unlike

the English Master fixes the date as well. There are no official facilities for parties to exclude or limit appeal by consent or for one of several delinquents to make a written offer of contribution to the others. The most important direction which the Master gives is probably as to whether the pleadings should be in writing or not. In Scotland this is to a large extent determined by the amount of money which is being sued for and the court in which the action is raised. In all actions, except small debt actions in the Sheriff Court (*i.e.*, for £20 or under) the pursuer must, as has been already explained, put far more into writing at the commencement of his action than the English plaintiff. In the Court of Session written pleadings for both pursuer and defender are obligatory in all cases. The defences consist of separate articulate answers to each paragraph of the pursuer's condescendence and the answers are numbered correspondingly. If necessary, a separate statement of facts may be added also in numbered paragraphs. The same applies to actions for over £50 in the Sheriff Court. In actions for over £20 but under £50, the pursuer must prepare a written condescendence and pleas-in-law but the Sheriff Substitute may or may not order written defences. Small debt actions are initiated by a printed form known as a summons, and there are no written pleadings.

As a result of the discretion which is given to the English Master or Registrar, it is probably true to say that pleadings are reduced to writing less often in England than in Scotland. Where counsel are employed, who are continually in court, and have no shorthand typist available, oral pleadings may save time. This is not so certain where counsel or solicitors are employed who spend some time in chamber practice and have shorthand typists at hand. In most cases pleadings are made more exact by being put down in writing and it is not altogether certain that the tendency in England to dispense with written pleadings, where possible, is an unmitigated blessing.

Where there are written pleadings in a Scottish litigation, both parties must include, in their pleadings, a section entitled pleas-in-law. In the pursuer's pleadings, this amounts to one or more distinct legal propositions, applicable to the facts of his case. Each proposition should be concise and without argument. In the case of the defender, the pleas-in-law fall into two classes—(1) Preliminary pleas and (2) Pleas on the merits. The former include objections to the jurisdiction of the court, etc., and what are known in England as objections in point of law. That is to say, they are objections to the title of the pursuer to sue the action, or the jurisdiction of the court to entertain it, or more importantly, to the competence or relevancy of the action, *viz.*, a statement that even accepting the pursuer's averments at their full face value, they do not disclose a relevant ground of action. The defender's

pleas on the merits are merely the converse of the pursuer's pleas, *i.e.*, the legal propositions upon which the defender maintains that the pursuer is not entitled to the remedy he seeks. It has often been suggested that Scotland should follow England's example and abolish all written pleas, except pleas to the relevancy (*i.e.*, objections in point of law). There is no doubt that some of the formal pleas-in-law seem at times superfluous, but pleas on the merits are a useful means of keeping before the pleader the target he is aiming at, and they are necessary to preserve the Scottish principle of giving the other side prior written notice, not only of the facts to be proved, but of the legal propositions to be developed in debate. The objection taken to pleas-in-law in England before they were abolished, was that they were used alone. That is to say, the pleadings contained not as in Scotland, the facts and the legal propositions in separate and distinct compartments, but the legal propositions without any statement of the facts on which these propositions were based. In such a form, pleas-in-law would not now be accepted in either country.

On the other hand, it is not suggested that in Scottish procedure the problem of when to use written pleadings has been settled in an entirely satisfactory manner. It may be that, as a general rule, it is better to have writing for the more important litigations and dispense with it when smaller sums are involved, but it has to be remembered that nowadays, when the ability to write is fairly widespread, it is much easier for a defender to write a letter to the court, explaining his defence, than to appear physically before the court either in person or through a solicitor. Parties and their agents or counsel should not be asked to appear physically in court until it is absolutely necessary—and until parties appear physically, procedure must of necessity be documentary. It could thus be argued that in Scotland the use of simple written pleading might with profit be extended to summary and small debt actions in the Sheriff Court. In such cases, at present, where a party is conducting his own defence, he must attend at the first diet, wait for his case to be called, state his case orally, and sometimes be told that he will require to come back on such and such a date for the proof—(in busy courts this may take all morning). If there were available to defenders, in small debt and Sheriff summary cases, some simple method of stating their defence in writing, such as exists in the county court in England, litigants with good defences would not require to give up two days' wages to defend themselves. Moreover, in an ordinary action in the Sheriff Court, the pursuer or his solicitor must appear physically in court at the tabling of the case. At this stage the defender has lodged a notice of appearance and as written defences are obligatory, the physical appearance in court of the parties or their solicitors at this stage seems to serve no good purpose, unless there is a motion to prorogate the time for lodging defences and where this is desired the

case could be specially enrolled by the defender for the purpose. If appearance at tabling were abolished, procedure would be entirely by documents until the adjustment roll, as in the Court of Session and in many cases procedure might, with advantage, be entirely documentary, in both Sheriff Court and Court of Session, until a debate on the Procedure Roll is reached.[1]

In Scotland the pleadings of the parties are conjoined in one document, known as 'The Record'. This contains the summons or initial writ, the pursuer's condescendences and pleas-in-law, the defences and the defender's pleas-in-law, but the condescendence and defences are interlaced so as to form one consecutive narrative, each numbered paragraph of the condescendence being followed by the corresponding paragraph of the defences. This usually results in a rather awkward document to read, the denial of the defender's averments appearing in print before the averments denied. In the Court of Session, an open record is made up, which consists of the pleadings before they are finally adjusted. As soon as copies of these are available, counsel are instructed to adjust the same so as to make the cases presented by the parties meet each other, disclose how far the parties are agreed upon the facts, and indicate the legal principles by means of which each party intends to justify his contention. On the earliest available day, being not earlier than a week after the period for lodging the open record has expired, the case is put out by the Keeper of the Rolls, on the Adjustment Roll of one of the Lords Ordinary. The case is now mentioned for the first time in open court and now for the first time counsel address the judge by word of mouth. All hearings are open to the public, but the written pleadings of parties cannot be published in the Press or referred to in any manner of way before the record is closed or the facts are mentioned in open court. So far as the condescendence and pleas-in-law are concerned, adjustments are practically unrestricted, but alterations on the instance and conclusions can only be effected by amendment (a procedure which is referred to later). If counsel indicate that they are ready to close their pleadings, the Lord Ordinary formally closes the record, but on special cause shown, on the motion of either party, or without special cause on the motion of both parties, the case may be continued on the Adjustment Roll for a period of one or more weeks, when it will come up again and the same procedure be repeated. In practice, few

[1] Since the above was written an Act of Sederunt has been passed dated June 29, 1950, virtually abolishing the existing procedure for adjusting pleadings. These are now left in the hands of parties and the Court is invoked only when the record is ready to be closed. It is said that the reaction of the Bar to this change has not been favourable. It may be that agents and counsel tend to forget cases without the periodic reminder of the adjustment roll or feel they are losing face when they draw attention to a case which everyone else has forgotten. At any rate it is said that the Act of Sederunt has resulted in cases being held up, although it is probably still too early to reach a definite conclusion as to this.

records are closed without at least one continuation, but the fact that the pleadings are at any rate formally closed by the judge has no doubt in some cases at any rate a salutary influence on the care with which they are drawn. If when the parties are ready to close, they are agreed that proof is necessary, and the Lord Ordinary approves, he will, when closing the record, allow proof, or if they are agreed that jury trial is suitable, and the Lord Ordinary approves, he will allow jury trial. In all other cases the Lord Ordinary, when closing the record, directs that the case be sent to the Procedure Roll. The closed record, with alterations made during adjustments, is then made up and lodged in court. In the Sheriff Court the same procedure is adopted in actions over £50, except that an open record is not made up, only a closed record, and as jury trials are not competent in the Sheriff Court, if jury trial is desired a motion is lodged to have the case transferred to the Court of Session.

The Scottish rules regarding written pleading in general are extremely simple. The English rules regarding pleading are much more complex, as a cursory glance at Order XIX reveals. In practice, however, Scottish pleading is much more detailed than English pleading. The English rules contain several provisions for the inclusion of particulars which are aimed at preventing a litigant from being taken by surprise. In Scotland such details should be stated in every case. Strictly speaking no facts which are not mentioned in the closed record should be proved, founded on in debate or form a basis for judgment, without amendment, and although a tendency has sometimes crept in to follow the less strict requirements as to written record, which are prevalent south of the border, the House of Lords case of *Vitruvia S.S. Co.* v. *Ropner Shipping Co.*, 1924, S.C. (H.L.) 31 is still an authority and brings out very clearly the difference in the two systems. In this case, Lord Phillimore confessed that ' his withers would have been unwrung ' by the comments of the Scottish law lords ' brought up as he was in a school in which a man who claims damages is expected to come into court with every form of proof and ready to meet every form of objection '. Such remarks make a Scottish lawyer wonder, perhaps a little wistfully, how it is that English lawyers succeed in being allowed to make things so difficult for themselves.

In both the Court of Session and the Sheriff Court, two classes of cases are debated on the Procedure Roll (1) cases in which the parties renounce probation, *i.e.*, cases in which the parties are not at issue as to questions of fact, and (2) cases as to which the parties are at variance as to whether there should be a proof or a jury trial, or, as to what proof should be allowed, or where it is maintained that preliminary pleas should be disposed of before determining as to proof. It used to be customary in Scotland for legal arguments to be in writing, but this has not been the practice

since 1850. The pleas-in-law which appear in the printed record are short and concise legal propositions, not legal arguments. Counsel or solicitors develop these propositions orally before the court. After hearing counsel or agents for the parties, the Lord Ordinary or the Sheriff-Substitute either announces his judgment in open court or makes avizandum. Where a case affects only the immediate parties and is so special that it has no conceivable value as a precedent, the Lord Ordinary or the Sheriff-Substitute does not give the grounds for his decision, *i.e.*, he does not give 'an opinion'. Otherwise, opinions are always given by immemorial custom. If an opinion is given in the Court of Session without making avizandum, it is taken down in court by a shorthand writer and lodged in court later. Cases which are taken to avizandum are put out when ready on the Judgment Roll. In the Sheriff Court, where there is an opinion, it is usually given only after avizandum. This opinion is written out and lodged in court when it is ready. It is not read in open court as in the Court of Session.

Amendment is either (a) an alteration on the instance or conclusions of the summons made at any time after it has been served on the defender, or (b) an alteration on the condescendence or answers or pleas-in-law subsequent to closing the record. Amendment may be made by leave of the court at any time before final judgment, even after proof, while the case is at avizandum or on appeal. The procedure adopted is to prepare a written minute of the proposed amendment and to enrol a motion to allow the minute of amendment to be received, although minor amendments are sometimes made, especially in the Sheriff Court, without lodging a written minute. Amendment will invariably be allowed for the purpose of determining in the existing action, the real question at issue between the parties, but subject to payment of expenses and opportunity being given to the other party to meet the altered situation.

The ordinary mode of trial in Scotland is before a judge without a jury. This is known as a 'proof'. Jury trials are competent in actions for libel, slander or nuisance, or actions for damages, in the Court of Session, but not in the Sheriff Court. Once an interlocutor has been granted allowing a proof in the Court of Session, the pursuer must deliver a copy of the closed record to the Keeper of the Rolls within seven days and the latter after consulting, so far as possible, the convenience of the parties assigns a day or days for the proof. In the Sheriff Court, the interlocutor allowing proof either fixes the date or continues the case to a later date when the date of proof is fixed in the presence of the parties or their agents.

The hearing of parole testimony by witnesses under examination and cross-examination in open court by the judge who decides the case, either with or without a jury, is almost without exception the accepted method of proof in Scotland. Parole proof is much

more exclusively employed than in England. Public records, attested deeds and to a certain extent holograph writings, are allowed to speak for themselves, but all other writings and productions must be made part of the oral evidence by being referred to by witnesses. Affidavits are almost unknown and are not competent in an ordinary action. Interrogatories are only used for the evidence of witnesses who, owing to illness or infirmity, or absence abroad, cannot attend the court or to havers of documents whose evidence is taken on commission. In all cases in the Court of Session and in all cases involving more than £50 in the Sheriff Court, the evidence of witnesses is taken down in shorthand and a transcript of the shorthand notes is lodged in court. In actions in the Sheriff Court over £20 but not over £50, either party may ask for the services of a shorthand writer. Where this is not done and in all small debt actions (*i.e.*, actions for £20 and under), the Sheriff makes an unofficial note of the evidence without the assistance of a shorthand writer. In their alacrity to make use of shorthand and the extent to which it was at once employed, the Scottish courts were pioneers. It was in general use in the Court of Session when its use was obligatory only in the Probate and Admiralty Division of the High Court in England. The method of leading evidence and the rules regarding evidence are, in the main, the same in England and Scotland, but preliminary statements are not as a rule made before leading evidence, owing to the fullness of the written record. Probably the principal difference between the rules of parole testimony in England and Scotland is the rule that in Scotland, in common with most other European countries, except England, the uncorroborated testimony of one witness is not sufficient legal proof, whereas in England it may be. This is said to be a relic of the effort made during the Middle Ages in Europe, to weigh evidence by mechanical means—an effort which led to many stupidities from which, no doubt, Scotland suffered as well as other European countries (although there is no evidence of this, apart from the survival of the corroboration rule). In any event, the corroboration rule, although at times decried and at times leading to mere mechanical repetition, has still got its uses if applied with discretion.

The facts which may be proved at a jury trial or proof are confined to the facts which are narrated in the closed record, but in a jury trial, when there are issues (and in practice there always are) copies of these and not of the closed record are handed to the jury. The adjustment of issues is supervised by the Lord Ordinary who formally approves them before they go to the jury. In practice, a counter issue of contributory negligence is frequently lodged, but the plea may be maintained without any written counter issue if it is in the closed record. In an action for damages in Scotland, the pursuer must state the amount which he claims and in a jury trial this amount is always stated in the written issue

handed to the jury. In Scotland the verdict of a jury after being enclosed for three hours need not be unanimous. The judge who presides at the jury trial, on the motion of one of the parties, issues a judgment applying the verdict of the jury.

Cases in which the Lord Ordinary 'makes avizandum' are put out by the Keeper of the Rolls for advising on a specific day on the Judgment Roll. The judgment is written out in chambers and on the day assigned, the judge appears in court, reads his opinion and pronounces the interlocutor disposing of the case or part of it. The formal interlocutor and the judge's opinion are then lodged in process and copies are made available to the parties and others interested, on payment of a fee. In the Sheriff Court the same procedure is followed, except that the judgment is not read out in court. In his final judgment, on the merits, the Sheriff-Substitute (unlike the Lord Ordinary) must set forth his findings in fact and law separately, and append to all interlocutors, except those of a formal nature, a note setting forth the grounds upon which he has proceeded. The work of a Sheriff-Substitute is thus not confined to his work on the Bench, to the same extent as it is in the case of the county court judge in England.

In most cases where an appeal is lodged, the grounds of the appeal need not be stated until the parties are heard orally in court—but in appeals under certain statutes written pleadings must be lodged, and this procedure must be followed in Scottish as in English appeals to the House of Lords.

J. Martin Mackay.*

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THE RIGHT TO RESCIND FOR BREACH OF CONDITION IN A SALE OF SPECIFIC GOODS UNDER THE SALE OF GOODS ACT, 1893

Section 11 (1) (*c*) of the Sale of Goods Act, 1893, provides that :—

'Where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.'

Section 17 of the Act provides that :—

'Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.'

Section 18, r. 1 of the Act provides that 'unless a different intention appears' :—

'Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made.'

In a contract to which section 18, r. 1 applies, it would appear then, that the right to rescind never arises 'unless there be a term of the contract express or implied to that effect'. The importance of these provisions is now enhanced by the decision in *Leaf* v. *International Galleries*[1] that when the right to reject for breach of condition is lost, the right to rescind for innocent misrepresentation is also necessarily forfeit.

The object of this note will be to determine what is 'an unconditional contract', and thereby to ascertain in what circumstances the right to rescind for breach of condition will, owing to the interaction of section 11 (1) (*c*) and section 18, r. 1, never arise.

It is necessary at the outset to observe that several distinct meanings are attributed to the term 'condition' in English law.

(i) It may mean 'an external fact upon which the existence of the obligation depends'[2] which is 'not part of the obligation itself'. Such are conditions precedent (or suspensive conditions) and conditions subsequent (or resolutive conditions). The case of *Pym* v. *Campbell*[3] provides an illustration of the former, and

[1] [1950] 1 All E.R. 693.
[2] Cheshire and Fifoot, *Law of Contract*, 2nd ed., 98.
[3] (1856) 6 E. & B. 370.

Head v. *Tattersall* [4] of the latter. Conditions precedent are relevant for the purposes of this discussion since they may operate to suspend the contract and therefore the passing of the property; conditions subsequent are irrelevant since they can have no effect upon the creation of the contract and the initial transfer of property; but pertain solely to the resolution of the contract, and the revesting of the property in the seller.

(ii) It may also mean 'not an external event by which the obligation is suspended or cancelled, but a term in the contract which may be enforced against one or other of the parties'.[5] A condition in this sense will henceforth be referred to as 'an essential undertaking'; *i.e.*, a stipulation going to the root of the contract as opposed to a mere subsidiary stipulation or warranty.

It is also important to distinguish between the breach of an essential undertaking, and an entire failure to perform the contract. 'If a man offers to buy peas of another, and he sends him beans, he does not perform his contract. But that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it'. When Lord Abinger said this in *Chanter* v. *Hopkins* [6] the term 'warranty' included both essential and subsidiary undertakings.

The problem under discussion is raised by the judgment of Denning L.J. in *Leaf* v. *International Galleries*.[1] The plaintiff bought from the defendant an oil painting of Salisbury Cathedral which was represented to him as a painting by Constable, a representation which was held to be one of the terms of the contract. Five years later the plaintiff found that the picture was not a Constable and brought an action for rescission on the ground that there had been a misrepresentation. The Court of Appeal held that the action was too late and must fail. Denning L.J. assumed in the buyer's favour that the term that the picture was by Constable was an essential undertaking, and that 'if he had come in proper time he could have rejected the picture, but the right to reject for breach of condition has always been limited by the rule that once the buyer has accepted or is deemed to have accepted the goods in performance of the contract, he cannot thereafter reject, but is relegated to his claim for damages'. The buyer in this case must be deemed to have accepted the goods, since section 35 of the Act provides that the buyer is deemed to have accepted, inter alia :—

'When after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them'.

[4] (1871) L.R. 7 Ex. 7.
[5] Cheshire and Fifoot, *Law of Contract*, 99.
[6] (1833) 4 M. & W. 399, 404.

It was not, of course, necessary to decide the exact moment at which the right to reject was lost, but Denning L.J. appears to have been of the opinion that there was such a right and that it continued to exist until the lapse of a reasonable time after delivery. There is no doubt that the painting was 'specific goods', *i.e.*, 'goods identified and agreed upon at the time a contract of sale is made' (section 62 of the Act). Section 11 (1) (*c*) was not excluded by an express or (apparently) implied term of the contract. Therefore, if this subsection did not operate to cancel any right to reject at the moment of contracting the only possible conclusion is that the property did not pass at that moment, nor indeed, until acceptance.

If this is so, then the operation of section 18, r. 1 of the Act was in some way excluded. Yet it seems that the picture was 'specific goods in a deliverable state', and the facts given in the report show no grounds for inferring 'a different intention', *i.e.*, no express provision as to the passing of property was made, nor are there any unusual factors to displace the prima facie rule of the Act. Section 18, r. 1 should then have applied if this were an 'unconditional contract'. The inference is that Denning L.J. did not consider it to be such.

Professor Gower, in discussing this case, suggests (Modern Law Review, Vol. 13, No. 3, p. 364) that *Varley* v. *Whipp* [7] is authority for the proposition that 'where the contract contains an unfulfilled condition, property, even in specific goods does not pass on the conclusion of the contract or by delivery, but apparently only on acceptance by the buyer'. Now section 17 of the Act (*supra*) provides that the property in specific goods is transferred to the buyer at the time the parties intend it to be transferred.

It is obvious that a contract may contain an essential undertaking which both parties believe to be fulfilled when in truth it is not so—as indeed occurred in *Leaf's Case*. In these circumstances, the fact that an essential undertaking is unfulfilled can have no effect on the parties' intention; which is exactly the same as it would be if the essential undertaking were fulfilled. Can it then be said that the parties' intention is of a contingent nature? *i.e.*, 'If the seller has fulfilled all the essential undertakings imposed on him, we intend the property to pass on the completion of the contract; but if he has not fulfilled any one of those essential undertakings, then the property is not to pass until acceptance'. If so, it is impossible to say whether the transaction is 'a sale', or 'an agreement to sell'; if the goods are destroyed before acceptance, it is impossible to say who owns the goods, since it is now impossible to ascertain whether the undertakings are fulfilled or not. It is submitted that no such artificial and inconvenient intention can be imputed to the parties. If therefore *Varley* v. *Whipp* [7] really

[7] [1900] 1 Q.B. 513.

does decide what Professor Gower suggests, it follows that whenever a contract contains an essential undertaking *whether fulfilled or not* ' property even in specific goods does not pass on the conclusion of the contract or by delivery, but apparently only on acceptance by the buyer '. If this is correct then it seems that ' unconditional ' in section 18, r. 1 means ' containing no essential undertakings '. If the contract does contain an essential undertaking rule 1 will be excluded, and the court will infer an intention that the property is to pass only on acceptance. This is in accord with the view of *Leaf's Case* which has been imputed to Denning L.J. above. The contract contained an essential undertaking; therefore rule 1 was excluded, the property did not pass until acceptance, and consequently there was a right of rejection until that time.

This is a somewhat startling theory, for the general impression given by the Act seems to be that ' unconditional ' means ' not subject to any conditions precedent ', and has nothing to do with essential undertakings. Thus in section 1 (2) ' conditional ' is contrasted with ' absolute '; ' a sale may be absolute or conditional '. The meaning of the term in this sub-section is illustrated by *Marten* v. *Whale*.[8]

The plaintiff and one Thacker entered into an agreement by which Thacker agreed to sell and the plaintiff to buy a plot of land for the sum of £385 subject to the purchaser's solicitor's approval of title and restrictions; and in consideration of the above transaction, the plaintiff agreed to sell, and Thacker to buy a motor car for £300, ' completion of such sale and purchase to be carried out simultaneously with the above transaction '. It was held applying section 1 (2) that ' assuming that the two parts of the agreement are interdependent, Thacker was a person who had agreed to buy the car under a conditional contract, and therefore under a contract of sale within the meaning of the Act '.

This was clearly a case of a condition precedent or suspensive condition. If ' conditional ' in section 1 (2) means ' subject to a condition precedent ', it is reasonable to assume that ' unconditional ' in section 18 means ' containing no such condition ', or ' absolute '. But it does not follow that an absolute contract cannot contain essential undertakings.

Yet at least two cases do seem to lend some support to the view that the mere presence of an essential undertaking will suffice to exclude section 18, r. 1, and to prevent the property from passing on the making of the contract. They are *Varley* v. *Whipp* [7] and *Ollett* v. *Jordan*.[9]

In *Varley* v. *Whipp*, A agreed to sell and B to buy a reaping machine which B had never seen and which A stated to have been

[8] [1917] 2 K.B. 480.
[9] [1918] 2 K.B. 41.

new the previous year and to have been used to cut only fifty or sixty acres. The machine was delivered and shortly afterwards B wrote complaining that it did not comply with A's description. After some correspondence B returned the machine. A brought an action for the price, and the court held that there was a contract for the sale of goods by description within the meaning of section 13 of the Act; by that section there was an implied condition that the goods should correspond with the description; B had not accepted the goods within the meaning of section 35; the property had not passed within the meaning of section 17; and the plaintiff was not entitled to recover.

Now section 17 upon which the court relied refers to 'specific or ascertained goods'; and it is therefore clear that they considered the reaper to be 'specific goods', though they do not expressly say so. Yet Channell J. goes on to say (p. 517) :—

'Section 18 does not apply; the only clause in that section which could possibly apply would be rule 1, but I do not think that this was an unconditional contract for the sale of specific goods'.

If the goods were specific, then Channell J. must have held the contract to be conditional; yet there is no hint of a suspensive condition of the type exemplified in *Marten* v. *Whale*.[8] The only 'conditions' were the essential undertakings that the reaper was new the previous year and had only been used to cut fifty or sixty acres. The case does then lend some support to the view that 'conditional' means containing an essential undertaking.

It may be remarked in passing that section 18, r. 1 could not possibly have applied in this case, because when the contract was made the reaper was the property of a third party and was subsequently bought by the seller; it was in fact a sale of 'future goods': section 5 (1), and could therefore only operate as an agreement to sell the goods: section 5 (3). However the court did not rely on this fact; nor, it should be noted, did it prevent the goods from being 'specific'; 'specific' in the Act is contrasted, not with 'future' but with 'unascertained'.

It is submitted that the true ground of this decision is that the seller had entirely failed to fulfil his obligation; the court held —rightly or wrongly—that he had not merely broken a term of his contract, however essential, but that he was in the same position as the man who undertakes to sell peas and supplies beans. This is clearly brought out by Channell J.'s illustrations (p. 516) :—

'If a man says that he will sell the black horse in the last stall in his stable, and the stall is empty, or there is no horse in it, but only a cow, no property could pass. Again if he says he will sell a four-year-old horse in the last stall, and there is a horse in the stall but it is not a four-year-old, the property would not pass. But if he says he will sell a four-year-old horse in the stall, and he says the horse is sound, this last statement would only be a collateral warranty'. If the facts of the case are to be equated

with these examples, can it truly be said that the reaper was specific goods? Is a cow 'specific goods', *i.e.*, identified and agreed upon, when the parties have contracted for the sale of a horse? Surely not. Here too, the parties had in mind a nearly new reaper, whereas that which the seller produced was a quite different thing. In this case, and in all the examples given by Channell J., the buyer had not seen the goods, and so the statements made went to *identification*. In *Leaf's Case*, the parties were agreed on that particular picture and were only mistaken as to its *attributes*. The absence of the supposed attribute was a breach of an essential undertaking, but it did not constitute an entire failure to perform the contract.

A more direct authority for the view that 'conditional' means containing essential undertakings is *Ollett* v. *Jordan*.[9] In that case the buyer at Eastbourne ordered fish from the seller at Hull. The fish was sent off by rail at 6 p.m. in sound condition and was delivered to the buyer at 1 p.m. the next day. At that time it had an unpleasant smell. The next morning it was inspected by the inspector of nuisances and condemned. The question in this case was whether the seller had exposed the fish for sale at Eastbourne, and whether the seller was at the time of the exposure, the owner. It was held that since there had been no acceptance, the property had not passed. Darling J. (with whose judgment Avory and Atkin JJ. agreed) said (p. 45):—

'In this case I think there was a conditional sale of the herrings at Hull when they were put upon the railway, but I do not think that the property in them was transferred until certain conditions were fulfilled. What were the conditions? Since the decision in *Beer* v. *Walker*,[10] a case relating to the sale of rabbits, it must be taken that the herrings were sold subject to an implied condition that they should be fit for food'.

The goods in this case were not of course specific; nevertheless the property should have passed under section 18, r. 5 if the goods were 'unconditionally appropriated to the contract' by being put on the railway with the (implied) assent of the buyer. The presence of what was clearly an essential undertaking was held to prevent the property from passing in accordance with the normal rules.

However, as Benjamin points out (6th ed., p. 733):—

'This decision does not seem satisfactory. No case on the particular point but *Beer* v. *Walker* was cited, nor was any attempt made in argument to contend that the property had passed to the buyer; and the controversy not being one between buyer and seller, the attention of the court was not drawn to the results of their decision in cases of sale. If the property in cases similar to *Beer* v. *Walker* be suspended until the buyer accepts

[10] 46 L.J.P.C. 677.

the goods at the end of transit, the consequence prima facie follows that the risk of the loss or destruction of the goods in transit attaches to the seller, as great a liability being thus forced upon him as if he had agreed to deliver the goods at their destination—an unfair consequence.'

These appear to be the only relevant authorities since the Act; and it is submitted that earlier decisions are of little value as section 11 (1) (*c*) appears to have altered the law. Benjamin says, with reference to that provision (6th ed., p. 645) :—

'Some difficulty arises in the interpretation of this clause so far as it deals with "specific goods, the property in which has passed to the buyer". If there be an unfulfilled condition in the proper sense, the property can never pass to the buyer by the contract (section 18, r. 1; *Varley* v. *Whipp*[7]) though it may pass by the buyer's subsequent acceptance. By the common law the existence in the contract of a "warranty", that is to say a stipulation as to some quality or incident of the goods, not forming part of their description and consequently not a condition, but collateral to the main purpose of the contract, did not prevent the property passing if otherwise it would pass; and when it passed, the buyer having been benefited by becoming the owner of the goods, could not afterwards reject them for breach of warranty, and repudiate the contract unless there was an express agreement to that effect. Accordingly a contract of sale of specific goods was ordinarily a bargain and sale. But clause (*c*) though evidently intended to enact this law uses the word "condition".'

It is not clear what is meant by 'condition in the proper sense'. It is submitted, however, that it must mean a condition precedent as opposed to an essential undertaking; for as we have seen Benjamin disapproves of the decision in *Ollett* v. *Jordan*,[9] expressing the view that the property should have been held to pass, although there was an unfulfilled essential undertaking. On the other hand, Benjamin appears to be of the opinion that no property passes when the goods fail to comply with their description. It is submitted that Benjamin is here thinking, not of a mere breach of essential undertaking, but an entire failure to perform the contract.

Benjamin's view is then that before the Act the mere passing of the property did not affect the right to reject for breach of an essential undertaking. Even if this is so, and even if the Legislature did intend to enact the existing law, the fact remains that they have used the term 'condition', and the meaning of section 11 (1) (*c*) is plain enough. The result is serious where the property passes before or at the time of delivery, for then the buyer's only remedy is an action for damages; and this though he has had no opportunity of examining the goods. This inconvenient consequence is avoided if it can be held that property in specific goods does not pass until acceptance. It is submitted, however, that

this course will lead to other equally unsatisfactory results; *e.g.*, if the picture in *Leaf's Case* had been destroyed after delivery but before acceptance, this theory would have thrown the loss on the seller; the seller would always bear the risk between delivery and acceptance of specific goods (except where there is a provision as to the passing of the property or the risk). This is an obviously unfair, and inconvenient result.

Apart altogether from the question of convenience, it is submitted that, in spite of the decisions in *Varley* v. *Whipp* [7] and *Ollett* v. *Jordan*,[9] an examination of the Act reveals that the existence of an essential undertaking is not intended to prevent the property from passing. If an essential undertaking does have this effect, then in a contract for the sale of specific goods when the parties have given no indication of their intention as to the passing of the property, and it has to be deduced entirely from the rules of the Act, the following consequences ensue:—

1. Section 18, r. 1 is rendered quite meaningless. Every contract for the sale of goods contains some essential undertakings, *e.g.*, that the seller has the right to sell the goods [11]; every such contract is 'conditional' in this sense and therefore rule 1 will never apply.

2. Yet rules 2 and 3 may operate to pass the property before acceptance in cases when the seller is bound to do something to the goods for the purposes of putting them into a deliverable state or ascertaining the price; since these rules do not use the word 'conditional', but provide that the property may pass when the things be done, and the buyer has notice thereof. It is plainly absurd that the imposition of these duties on the seller should hasten the transfer of property when it is obviously the intention that they should delay it. 'Does not pass until such thing be done' clearly implies that if such thing did not have to be done the property would have passed already.

The conclusion is that 'unconditional' in section 18, r. 1, is intended to mean 'subject to no conditions precedent' and no more than that. There is no decisive authority to the contrary, though *Varley* v. *Whipp* and *Ollett* v. *Jordan* and the dicta of Denning L.J. in *Leaf's Case* do suggest the contrary. It is submitted that when it is necessary for the court to decide the question, it can come to only one conclusion in view of the consequences which as demonstrated above follow from the other view.

If this submission is correct no right to rescind will ever arise in a contract, subject to no conditions precedent, for the sale of specific goods in a deliverable state, where the parties have expressed no intention as to the passing of the property or the

[11] *I.e.*, the seller guarantees not only that he has a good title to the goods, but also that no third party is in a position to obtain an injunction to prevent the sale: *Niblett* v. *Confectioners' Materials* [1921] 3 K.B. 387.

right to rescind, and there are no unusual factors to displace the prima facie rules of the Act.

Finally, it is interesting to compare the position of the buyer of specific goods with that of the buyer of unascertained goods as regards the right to rescind, as illustrated by the following cases :—

(i) A wishing to buy a car writes to B asking for a model suitable for touring purposes; B recommends and offers to supply a Bugatti; A orders a Bugatti; B makes delivery whereupon the property passes to A : section 18, r. 5 (i). A tries the car and finds it unsuitable for touring purposes. A can reject the car; the goods in this case were not identified and agreed upon at the time the contract of sale was made, and therefore section 11 (1) (*c*) does not operate until acceptance.

(ii) A goes to B's garage and is shown a car which B guarantees to be suitable for touring purposes; A agrees to buy that very car. A tries the car and finds it unsuitable for touring purposes; A cannot rescind since the property passed on the making of the contract, and section 11 (1) (*c*) operated simultaneously.

The position of the buyer who is induced to buy specific goods by an innocent misrepresentation which is not incorporated as a term of the contract is even worse. If the misrepresentation had been a term of the contract he could not have rescinded; as it is not, a fortiori he cannot; nor of course can he obtain damages. But if the goods happen to be unascertained, his right to rescind for innocent misrepresentation, presumably arises and survives until acceptance.

There does not seem to be any good ground for discriminating against the buyer of specific goods in this manner, and in conclusion, it is suggested that his position could be assimilated to that of the buyer of unascertained goods, by deleting from section 11 (1) (*c*) the words : ' or where the contract is for specific goods, the property in which has passed to the buyer '.

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FEDERALISM AND REGIONALISM

A Note on the Italian Constitution of 1948

During the fifty years of the Irish Home Rule controversy, from about 1870 to about 1920, the question of regional devolution was one of first-rate political and constitutional importance in this country. Since the creation of the Irish Free State in 1921 the English (though not the Scots and the Welsh) have almost forgotten that regionalism can be a constitutional issue. A great deal has been said in recent years about administrative regionalism, and about regions as a cure for the *malaise* of English local government, and about geographical regionalism as a reasonably scientific way of classifying human habitats : but all this talk has reacted very little on politics and on constitutional theory. Yet the political importance of these issues has grown, and may grow further; and it is perhaps time to take another look at the orthodox constitutional doctrine as it has been handed down to us by Dicey.

This doctrine poses the sharp alternatives of Austinian jurisprudence; legal sovereignty is indivisible, therefore in any country either it resides in the central legislature or it does not reside in the central legislature.[1] If it does not reside in the legislature, the true sovereign is elsewhere and has delegated his powers separately to different authorities. There may be a constitutional division of functions between legislature, executive and judiciary: or between central legislature and local legislatures : or there may (as in the U.S.A.) be both divisions. In such cases one may be puzzled to say where true sovereignty lies: does it lie with ' We, the people of the United States ' or with ' we, the nine old men of the Supreme Court ' ? But it is clear that it does not lie with the central legislature, as sovereignty in the U.K. lies with Parliament. The magic of the British constitution resides in the Sovereignty of Parliament and in the Rule of Law, two interlinked ideas : it is logically impossible to mitigate the Sovereignty of Parliament except by constituting a new sovereign. To do so would be Federalism, and Federalism would be a disaster to English interests as well as a revolutionary change in the constitution. This is the theme which Dicey pursued in almost all his later works.[2] The doctrine, though

[1] Dicey in his eighties seems to have mellowed on this point, as on some others. In *Thoughts on the Scottish Union* (1920) (p. 100) he admits that the Austinian doctrine need not be true as an account of a real situation, and was not true of the relations between the Scottish Parliament and General Assembly from 1690 to 1707: his claim is only that inconvenience will result if it is not followed.

[2] *England's Case against Home Rule* (1886); *Letters on Unionist Delusions* (1887); *A Leap in the Dark* (1893, reissued 1911); *A Fool's Paradise* (1913). *Thoughts on the Scottish Union* (1920) is a much more open-minded and stimulating exercise on the same theme.

not its political conclusions, are still there in Professor Wheare's book on *Federalism*, the first edition of which appeared in 1946.

There are two possible lines of comment. One is to attack the Sovereignty of Parliament itself, by casting doubt on Dicey's explanation of the authority of the constitution. In his view it owes its authority ultimately to the law of the land, and the law of the land owes its authority to Parliament. This doctrine is not altogether satisfactory even on legal grounds,[3] but these need not be argued here. The main point is that it just does not match our normal usage of the word 'constitution'. Whatever we mean by it, we do *not* mean the unlimited sovereignty of Parliament. The Act of Union with Scotland, adopted in 1707, forbade the introduction of lay patronage into the Church of Scotland: lay patrons were introduced by an Act of Parliament of the U.K. passed in 1712. This Act was itself legal, and it did not lead to illegal consequences: but it was a perfectly plain instance of what we mean by an 'unconstitutional act'. Similarly, it would be natural to say that the sovereignty of the Parliament at Westminster is already morally and practically (though not legally) limited by the rights of regional bodies. It would plainly be unconstitutional for Parliament to abolish the Court of Session or the General Assembly of the Church of Scotland: it has been declared by a recent Act that it would be improper for the Westminster Parliament to cede Northern Ireland to the Republic of Ireland without the consent of the Parliament at Stormont[4]: and it would be just as unconstitutional to abolish the teaching of Welsh in Welsh schools and to close the Welsh department of the Ministry of Education without some expression of Welsh consent. Even the status of the Channel Islands and of the Isle of Man has considerable constitutional sanctity. If one looks at the situation as it is, and not at legal theory, there is no doubt that regionalism of a kind is already part of the constitution of the U.K. This is not merely a statement about the extent to which it is expedient for Parliament to exercise its powers—Dicey's 'external limit'[5]: it is also a statement of what is generally felt to be right and proper. There are things which Parliament could legally do, but which it does not do because a majority of its members think them wrong. In this the constitution is above Parliament, not subordinate to it.

[3] Dicey himself would complete it by saying that Parliament uses its absolute discretion 'constitutionally' when it acts so as to promote the greatest happiness of the greatest number. 'On any wide view of large public questions expediency will be found to be only another name for justice' (*England's Case*, p. 13). But Dicey's utilitarianism is not very austere: he is always ready to mitigate the reader's instinctive dislike of this argument by distinguishing between 'the law of the constitution' and 'constitutional morality' (*e.g.*, *England's Case*, p. 246).

[4] Ireland Act, 1949 (12 & 13 Geo. 6, c. 41).

[5] *Introduction to the Law of the Constitution* (8th ed., 1931) p. 74.

But one may also attack the doctrine on logical grounds, as well as on grounds of normal usage. Is it really essential to legal principle to draw a rigid line between unitary and federal constitutions, as between black and white? The object of this paper is not to answer that question, but to state a case for consideration by those better qualified to judge. There have in Italy since 1945 been discussions, theoretical and practical, which raise important issues not hitherto considered in this country.

Italy did not from Roman times until 1870 form a political unit: the sentiment of Italian nationality had from the later Middle Ages been a strong factor in the politics of all those who spoke Italian, but their political organisation and history were very diverse, and their economic progress no less so. It is not surprising that several of the publicists of the Risorgimento thought in terms of a federation, or even a confederation, and not of a unitary State. When the time came their doubts were swept aside by an irresistible combination of fact and theory.[6] Theory laid it down that between federalism and unity no compromise was possible; and in 1860, when the union of Piedmont with the Kingdom of Naples and Sicily was new and precarious and when the North and South in America were on the verge of civil war, there could be no doubt which was the right choice. Italy chose unity, not federalism: the Piedmont constitution of 1848 was extended in 1860 to all Italy except Rome and Venezia, and these were added in 1870. That constitution was what might be called a good Orleanist constitution: a marriage of the centralising and popular traditions of the French Revolution to the British invention of constitutional monarchy. The constitution was unitary, and within it Parliament (or the King in Parliament) was by usage sovereign in a sense which would have been as acceptable to Robespierre as to Dicey. What is more, it carried with it an administrative system on the Napoleonic model: Italy was until the fall of Fascism a 'prefectoral State'.

This was perhaps the best that could be done in the 1860's: but the contrast between centralism in theory and diversity in practice was one of the factors which produced a sense of strain and unreality in Italian democracy before 1914. It expressed itself most glaringly in the contrast between North and South, between an Italy as advanced as any State in Western Europe and one as backward as some countries of the Middle East—or as Ireland was in the 1840's; but there were also lesser 'regional' problems, such as those of Sicily and Sardinia. These were divisions between people who shared a common language. In 1919 Italy acquired in the North-East substantial German and Slovene minorities, whose political importance was even greater than their numbers because they inhabited a strategic border region. Some attempt to grapple

[6] 'The sagacity of Italian statesmanship rejected the plausible scheme of an Italian Federation': Dicey, *England's Case*, p. 66.

with both problems, the old and the new, was made between 1919 and 1921, but they seemed insoluble, and this was one among many factors which made the way easier for the Fascists, who were prepared to deny that the problems existed.[7] Mussolini produced a sham solution for the problem of Left and Right in politics: he merely ignored the existence of regional divergences within Italy.

There were thus long arrears to be settled when the war of 1939 was over and the time came to write a new Italian constitution. It was obvious that the German and Slovene minorities could do serious damage to Italy's international position if they were not given fair treatment. Another small linguistic minority, that of the Val d'Aosta, had become politically conscious. It is not clear to what nationality the Valdostians belong, for they are not without qualification Italian and they are certainly not French; and they are a border folk in a position of some strategic importance. The economic situation of the South had not improved; and its politics had been complicated by the Allied advance through Sicily, Sardinia and the old Kingdom of Naples, which unwittingly created forms of regional self-government in areas which had never been able to secure self-government under the Kingdom of Italy. By 1946 all Italian parties were committed in different degrees to an attack on centralisation and bureaucracy, and when the Constituent Assembly met in June, 1946, it could not avoid facing the question of regional devolution, political as well as administrative, though it had little precedent in the traditions of the Italian State.

Fortunately there now existed a constitutional formula which offered, or purported to offer, a third alternative which was neither a federal nor a unitary State. This had been put forward by Professor Gaspare Ambrosini, of the University of Rome, in a number of articles published between 1933 and 1935[8]: their subversive tendency seems to have escaped the notice of the Fascist authorities. Professor Ambrosini examined in detail the constitutions of a number of countries which could not readily be classified either as federal or as unitary States, although some of them claimed to be either one or the other. His main instances were Austria (not 'Austria-Hungary') both before and after 1918, the Spanish Republican constitution of 1931, the Weimar constitution, and the Soviet constitutions of 1924 and 1936. To this list he tentatively adds the British constitution in respect of the special status of Northern Ireland and Scotland, and the pre-war constitution of Yugoslavia. On these cases he built the theory of a 'State characterised by regional autonomy', which he distinguishes both from the federal and from the unitary State.

[7] Mussolini, cited in *The Times* of August 15, 1950: 'The southern question does not exist'.

[8] These articles were collected and republished in book form in 1944, shortly after the liberation of Rome: G. Ambrosini, *Autonomia Regionale e Federalismo*, Rome, 1944.

The point at issue can be seen most clearly if it is approached through the Continental jurists' distinction between *autarchic* and *autonomous* bodies within the State. Both types of bodies possess corporate personality and a measure of local discretion. The former, *autarchic* bodies, draw their personality and powers from the legislature of the State: English local authorities, for instance, are autarchic bodies, in that their status, including their charters, can always be modified by Act of Parliament, if Parliament so determines. *Autonomous* bodies draw their personality and powers not from the legislature but from the constitution. The constitution has also created the central legislature; it may have given it larger powers, but not a superior status. This would describe the position of the States within an undoubted federation such as the U.S.A. or Australia.

So far, this is old: what is new is a distinction drawn within this latter class. Its basis is not in Professor Ambrosini's original articles stated anywhere with clarity and finality : but this absence of a perfectly sharp dividing line is an essential part of the theory. He makes three points, explicitly or by implication. *First*, in federal States the member States are represented *as such* in the highest legislative body of the federation. *Second*, normally the members of a federation have existed as independent States before federation, whereas ' regional ' bodies derive their juristic existence solely from the constitution of the State; the constitution of a federation is in some sense a treaty, it has a ' contractual origin '. *Third*, federal States are those in which the autonomous bodies possess at least some ' national ' or ' sovereign ' powers (of course they cannot possess all such powers, or they would be independent States): regional States are those in which autonomous bodies exist but do not possess any ' national ' or ' sovereign ' powers. Perhaps one should say ' do not possess such powers *as of right* '; their claim as guaranteed by the constitution, written or unwritten, extends only to existence and to non-sovereign powers. Greater powers may be given them, but that will be only at the discretion of the central legislature. This third point is in a sense a generalisation of the first two. It is not in Professor Ambrosini's articles fully explicit, and it is the most difficult of the points to apply legally; nevertheless it is essential to the development of the theory. The essence of the theory is that there is ample constitutional experience to justify the substitution of a scale of unity—in three stages, but there could in principle be more—for the traditional dichotomy between federal and unitary States; and it is only by applying this criterion that one can obtain what might be called a gradation of Statehood.

This is a scanty summary of a doctrine which draws much of its strength from examples, and it is scarcely a sufficient basis for criticism. But two points may be made, telling in different directions.

In the first place, the academic doctrine of the federal principle, though elegant, is somewhat sterile. Professor Wheare is irrefutable when he defines the federal principle as 'the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent': but he is not interesting, and indeed for most of his book he is engaged with other and more interesting matters. What Professor Ambrosini has done is to accept this criterion, but to add a second. The federal State is not merely a State marked by the federal principle: it is one in which the federal units possess a real share of sovereign power. Where the sovereign power is not divided there is no true federation. This seems much more promising. We have all in our minds some vague classification of State powers in order of magnitude and could plot some sort of curve reaching upwards from the power to change the shape of postmen's helmets to the powers of peace and war and of public order. When we want to know whether a State is centralised or decentralised we ask in real life not about the federal principle but about the point where the division of central and local powers falls on this scale. It is an empty form to say that a State is a federation if the units (or, on the other hand, the central government) have no power *except* to regulate postmen's helmets.

It should be added that Professor Ambrosini discusses the effects of practice as well as those of formal law and certainly believes that regionalism, in the sense of a guaranteed existence, can be conceded or withdrawn by constitutional usage as well as by law. His 'regionalism' is a sub-species of Professor Wheare's 'federalism': but this recognition of usage goes further than his principle of the gradation of powers in blurring the sharpness of the distinction. This, too, is a gain in descriptive realism.

On the other side, although this new line of classification is welcome to the political scientist, it may not be so welcome to the lawyer. It confuses the picture because it introduces a distinction of a new type: Ambrosini's distinction between autarchic and autonomous is a distinction of law within the framework of Austinian jurisprudence, his distinction between federal and regional is a distinction not of law, but of fact: it is an appeal not to a formula but to the judgment of the 'reasonable man'. The distinction between sovereign and non-sovereign powers is hard to pin down in any form of words, because the significance of a power shifts according to the historical context: even the power to design postmen's helmets would be a sovereign power if the shape of helmets became symbolic of great issues. There would be an international incident of some importance if one of the German *länder* chose to dress its postmen in the uniform of the S.S. It may be possible with ingenuity to frame definitions which will be helpful, though not exact: but even then 'federal' and 'regional' will not lie in opposition to one another, but in continuity, as segments of an unbroken slope. A court of law

which attempted to decide cases on this basis would in marginal cases perform a political, not a legal function.

There are various mitigations of this difficulty. In the first place, it does not look from the text of the Italian Constitution as if the matter will be very troublesome in practice. The Italian Supreme Court may have to decide whether or not the central legislature has interfered with the guaranteed *existence* of the regional governments: it may have to decide on the scope of particular powers and duties enumerated in the Constitution: it may in difficult cases call to its aid the general doctrine of regionalism. But it does not seem that there is anything in the Constitution which turns on the legal meaning of the word 'region', as clauses of the American Constitution turn on the meaning of 'commerce' or 'general welfare' or 'due process of law'. In the second place, one branch of law, international law, has already had to face this issue in questions affecting the recognition of States. The decision to recognise or not to recognise is a political decision: but it would be accepted fairly generally that the decision would be contrary to law unless certain conditions were fulfilled. It is a question of *fact* whether these conditions are fulfilled or not: but lawyers have succeeded on the basis of precedents in enumerating in some detail conditions such as independent power to make peace and war and effective authority in foreign affairs, and in indicating the sort of evidence which might show that these conditions have been met. Some progress has been made in this quarter in defining at least the main contours of the gradation. Finally, the regionalists can answer the federalists with a *tu quoque*. Regionalism may involve some legal knots; but they cannot be worse than the knots tied by the Founding Fathers in 1787.

However the balance of argument stands, this is certainly not a doctrine to be lightly put on one side: it was admirably fitted to the political situation of Italy in 1947, and it was deliberately chosen as the basis of the Fifth Title of the Constitution, which deals with regions, provinces and communes. The first draft of this title was produced by a sub-committee of ten members of the Constituent Assembly, whose chairman and rapporteur was Professor Ambrosini himself, and there were no fundamental changes during later discussion.[9]

The title contains twenty articles, some of them likely to pose difficult legal problems, and there is a good deal in it not covered by this summary. Italy is divided into nineteen regions, five of which are 'special regions' whose status is to be defined individually by separate constitutional laws. These five are the regions which raise political problems of special difficulty: Sicily, Sardinia,

[9] The text of the Constitution is not yet available in English. What follows is based on the Italian text, edited with notes on the course of the debates by Falzone, Palermo and Cosentino: published by Colombo (Rome), 1948.

the Val d'Aosta, Trentino-Alto Adige, where there is a German-speaking minority, and Friuli-Venezia Giulia, which still contains some Slovenes even after the readjustment of the frontiers in favour of Yugoslavia. When the Constitution was adopted in December, 1947, Sicily had already secured a statute of its own, accepted by the Constituent Assembly. Statutes for Sardinia, Val d'Aosta, and the South Tirol were promulgated by laws of the Republic in January, 1948 : that for Friuli-Venezia Giulia awaits a formal settlement of the frontier dispute with Yugoslavia. What follows applies strictly only to the fourteen ' standard regions ', which correspond pretty closely to the historic divisions of the peninsula; but it will in general be true also of the five special regions. The boundaries of the regions in the first instance follow those of existing provinces (ninety-one in number), which they group together. Provinces or communes which request it can (after a local referendum) be transferred by ordinary law from one region to another : but it requires elaborate procedure followed by a change in the Constitution to amalgamate two existing regions or to create a new region by sub-division. In this sense the *existence* of the regions is guaranteed by the Constitution.

An ordinary law of the Republic will define the system of election for regional councils : these councils will themselves approve (by an absolute majority of their members) a regional statute defining in detail the administrative and legislative procedure of the region, which may include the use of the initiative and the referendum. These statutes are subject to approval by the central legislature, which may refer them back to the regional councils for reconsideration: but if the disagreement cannot be reconciled by compromise the final decision would (it is believed by Italian jurists) rest with the Constitutional Court, not with the central legislature.[10]

The regional council elects its own chairman : in addition it elects from among its members the President and Junta of the region, who are the heads of its administration and might be described as its Prime Minister and Cabinet.

So far this is fairly straightforward : there follow three critical matters, legislation, finance and central control.

(a) *Legislation.* There was a clash of opinion here of some importance. One group wished to divide functions in the traditional federal manner : exclusive powers of the centre, exclusive powers of the regions, concurrent powers.[11] A second group considered that the Constitution would slip from regionalism into federalism if any powers were given exclusively to the regions.

10 G. Balladore Pallieri, *Diritto Costituzionale (secondo la nuova Costituzione)*. Milan, 1949, pp. 248–9.

11 Professor Ambrosini had himself in his original article in 1933 required 'hat in a regional State the regions should possess some exclusive competence. (*Autonomia Regionale e Federalismo*, p. 13.)

This latter view prevailed in form, but after concessions in debate which leave the final position somewhat obscure. A single list of topics is given for which the region 'makes legal rules within general principles enacted by the central legislature, provided that these rules do not conflict with the interests of the nation or of other regions'. This seems to mean that for the enumerated subjects the State can in future legislate only in general terms: detailed provisions, which would previously have been made by the equivalent of 'statutory instruments', will in these cases be made by the regional councils—and by them only. But they cannot even in this sphere modify State law: nor can they (it seems) take the initiative until general principles have been centrally enacted.

Outside this sphere the central legislature can delegate rule-making power to the regions if it wishes.

The sphere in which the regions appear to have a monopoly of rule-making power is pretty wide, and not closely defined. The list is as follows:—

Regulation of offices and administrative organs subordinate to the region.
Communal boundaries.
Local police in towns and country.
Fairs and markets.
Public assistance, personal health and hospital services.
Technical education and financial aid to students.
Local museums and libraries.
Town planning.
Tourist trade and the hotel industry.
Tram and bus services of importance within the region.
Roads, water mains and public works of importance within the region.
Lake navigation and harbours.
Mineral springs and hot springs.
Quarries and peat bogs.
Game.
Freshwater fisheries.
Agriculture and forestry.
Handicrafts.

The list can be amended only by a change in the Constitution.

(b) *Finance.* The problem of local finance, which seems acute in England, is ten times worse in Italy, where the gap between the richest and the poorest areas is very wide. The experiment in regionalism has little prospect of success unless the State can redistribute resources between regions on a large scale without destroying regional autonomy in the process. This riddle may be insoluble: the Constitution certainly makes no attempt to solve it. It lays down only that the regions may hold property, that the legislature must allocate to them by ordinary law sufficient revenues

for their ' normal ' expenses, and that it may in special circumstances make grants for particular purposes. The only comfort which this article gives to the poverty-stricken South and Islands is that it refers to them specifically as possible beneficiaries of this discretionary power.

(c) *Control.* By contrast, the question of control in other spheres is very elaborately handled. By way of preface, it should be said that it is plainly intended that the central government should use the area of the region for the administrative decentralisation of those services which it retains in its own hands. It is provided that a ' Commissioner of the Government ' will reside at the capital of each region, will superintend all central government services within its area, and will ' co-ordinate ' them with the regional services. It is to be emphasised that this gentleman is not a prefect, that he exercises no ' tutelle administrative ', and that he reappears in only one of the articles dealing with control. These may be arranged under three heads :—

(i) *Administrative.* An ' organ of the State ' will have power to quash administrative acts of the regions on legal grounds (roughly the equivalent of ultra vires, although Continental administrative courts take a rather wider view of their powers than do the English courts). It may also have regard to the policy of such acts, but if it does so it has power only to refer them back to the regional council, with a statement of its objections.

There was much argument as to the proper form of this ' organ ', and it was ultimately left to ordinary law (not constitutional law) to decide. The constitution prescribes only that the ' organ ' shall be decentralised : but it adds in the same article (perhaps as a hint) that the lowest tier of the heirarchy of administrative courts is in future to be located in the regional capitals. This had hitherto been in the provincial capitals, which may in future retain only ' sub-sections '.

(ii) *Political.* In certain circumstances the President of the Republic (which means in practice the Prime Minister and Cabinet) may dissolve a regional council : the decree must state reasons, and must have been submitted (for advice, not for approval) to a standing committee of the two Houses of the Legislature, which is to be set up for regional questions. The effect of dissolution is that the regional government is taken over temporarily by a commission of three citizens of the region, who are to hold fresh elections within three months.

There are five sets of circumstances which may call these reserve powers into action : acts by the regional council contrary to the Constitution; serious illegalities; reasons of national security; refusal to remove a regional President and Junta guilty of unconstitutional or illegal acts; failure to reach a decision on the appointment of President and Junta. These are politically very large

powers; but they are clearly the minimum which is necessary if the central government is to bear its responsibilities for national defence, internal order and the continuity of administration.

(iii) *Legislative.* It is rather difficult for a foreigner ignorant of Italian procedure to say how far the articles so far summarised give any party a title to sue in the Supreme Court on an issue of constitutional law.[12] There is no doubt about the position under the next article. All laws passed by the regional council require the counter-signature of the Commissioner of the Government; he must either append this within thirty days, or refer the law back on the grounds that it is ultra vires or that it is contrary to the interests of the nation or of other regions. The regional council may override this veto by a majority of its membership; if it does so the Government may give way or they may press their objection within fifteen days. If the objection is a legal one they must take it before the Supreme Court; if it is one of substance, they must refer it to the legislature. The latter will mean making the matter one of confidence in two Houses in which the Government must maintain a majority, so that it is not to be undertaken lightly; and it is for the Supreme Court to decide whether the issue is one of law or of substance.

These three points together make an elegant and logical structure which fits Professor Ambrosini's theory well. The central government has certain general reserve powers: these are great powers, but not of a different order from those held by the Government of the United States under the war power and the guarantee of a Republican form of government. Within its own sphere of legislation the regional council is protected by the Supreme Court, but this is not an absolute protection; it may be overridden on grounds of national interest, but the procedure laid down is such that this is not likely to happen except on major issues. The Italian Parliament, like all free parliaments, has a crowded time-table; the Government will be reluctant to add to its business, and if it does it may well find hostility on its own side of the house to any hint of centralisation. Within its administrative sphere, as defined by State and regional law, the regional government is autonomous and subject only to check for ultra vires, and to some undefined but mild supervision of the substance of its decisions.

It should be added (finally), to complete the picture, that the Constitution recognises the corporate existence of provinces and communes within the regions, but it gives them no guarantees[13];

[12] The provisions governing the competence of the Constitutional Court are contained in Constitutional Law No. 1 of Feb. 9, 1948, which certainly concedes to private parties the right to raise constitutional issues, subject to some limitations.

[13] They are in the sense of Professor Ambrosini's definitions, 'autarchic' but not 'autonomous': but the Constitution itself is not consistent in the use of these terms.

the regional governments will (it seems) be responsible for the general supervision of their administration. But all this is far from clear: it was understood in the Assembly's debates that the provincial prefect would be abolished; but he is still there.

What can be said by way of comment? It must be understood that as yet we can comment only on the text. The Constitution was adopted in December, 1947; in March, 1951, the structure of regions is still not complete and in working order.

In the first place, this title is like the rest of the Italian Constitution: a good piece of craftsmanship. The drafting is plain and economical, and the articles fit together to make a structure of great theoretical elegance. In these respects the Italian Constitution puts most other post-war constitutions to shame.

Second, one is bound to emphasise that the draftsmen's hearts failed them when they came to finance. But no federal draftsmen have done much better; and in other respects the regional framework looks practical as well as elegant. It is plainly right to recognise the special position of the two islands and the three frontier regions. It is only in these cases that regionalism in some form is a political necessity. These five problems *must* be solved if Italy is to survive as a State within its present frontiers: the constitutional theory of regionalism may give the framework of a solution, but it would only do harm to impose a standard pattern upon all five. None of the fourteen 'standard regions' has ever in this century dreamt of secession, and they are relatively safe ground for a theoretical experiment in devolution.

Third, the legal pattern is very close to Professor Ambrosini's ideas. The existence of the regions jointly and severally is guaranteed by the Constitution. Their powers are not guaranteed, and their activities can in the last resort be legally controlled by the central government and the central legislature. But there are elaborate provisions which encourage the central authorities not to intervene except on issues of great national importance; it is to be expected that over a period of time constitutional usage will grow up to protect the regions in the exercise of a considerable range of powers, if they have sufficient vitality to use them.

Fourth, these ideas seem to have general applications of some importance. We are not, in the United Kingdom, likely to sit down now and write a constitution for ourselves on the Italian model: but Italian theory is applicable with only minor adaptations to our present situation. The United Kingdom is already a regional State, in respect of Northern Ireland, Scotland and Wales: once this is recognised it should be easier to face the issue of Home Rule for Scotland and Wales free from the old bogey of separatism. Regionalism is not a step to separatism, but a safeguard against it.

The position of the two 'kingdoms' and the 'principality' may be compared to that of the Italian 'special regions'; the problem of self-government within England has something in common with the problem of the Italian 'standard regions'. 'Home Rule all round' and 'Back to the Heptarchy' are cries which do not awake much popular response at present: but if anyone wishes to experiment with them here is a model ready to hand.

There is likely to be a more direct field of application in the countries now emerging from the colonial stage. Hitherto the textbooks have urged them to choose between unitary and federal government: a very awkward choice for a country like Nigeria. Such a country will stick forever if it attempts with inadequate resources to develop a dominating central government: it will stick no less certainly if it breaks into federal units and gives these units (some of which will certainly be very conservative) an absolute guarantee that in certain fields they can disregard the national interest. The regional solution would give an absolute guarantee (for instance) to the corporate existence of tribes and emirates, as entities within the State, and a rather less rigid guarantee of their territorial limits; but it would subordinate their demands to the necessity of creating a State strong enough to stand on its own feet. There are other cases which come to mind, such as the Gold Coast or Indonesia, where a colonial Power has imposed unity on diversity. The unity is an asset too precious to dissipate, and yet it can scarcely be maintained unconditionally with the resources at the disposal of these States. No formula can solve such problems, but the lack of a formula may make them harder. Perhaps Professor Ambrosini's formula is to be commended particularly to African constitutionalists.

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REPORTS OF COMMITTEES

The First Report of the Monopolies Commission

1.

The Monopolies and Restrictive Practices Commission is constituted in terms of the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948.[1] The names of its first eight members (six part-time) appointed by the Board of Trade were announced in January, 1949. The Act, which was passed unanimously, provides for the investigation of industries or trades in which a substantial part (at least one-third) of the supply (or processing or export) of the goods concerned is bought or sold by individual firms, or by inter-connected firms, or by groups of separate firms who 'so conduct their respective affairs as in any way to prevent or restrict competition' in the production and supply of the goods. The initiative to institute inquiries rests with the Board of Trade, which may as they think fit make 'references' for investigation by the Commission. The references may be of two kinds, either limiting the Commission's investigation and report to the facts, or in addition requiring the Commission to investigate and report whether conditions and practices in the industry concerned 'operate or may be expected to operate against the public interest'. The Act requires the publication of the Commission's reports save in exceptional circumstances. It also makes provision for dealing with 'mischiefs'.

The Act does not declare any particular monopolistic conditions or restrictive practices to be illegal. It does not lay down that practices which tend to weaken competition or to promote monopoly are obnoxious in themselves. It merely provides machinery for investigation of particular cases by a specially constituted body, and for remedial and preventive action if such is considered necessary by Parliament. The approach is therefore different from that adopted in the United States of America or in Canada, where anti-trust legislation has attempted to define illegal acts of monopoly and restriction and to provide for the punishment of offenders. However, to guide the Commission in assessing whether particular activities and conditions are against the public interest the Act indicates what matters, inter alia, should be considered. These are necessarily in general terms. and stress the need for maximum efficiency, economy, technical progress, and

[1] 11 & 12 Geo. 6, c. 66. For discussions of the Act by two economists, see Sir Arnold Plant, 'Monopolies and Restrictive Practices', in *Lloyds Bank Review*, October, 1948, and W. A. Lewis, 'The British Monopolies Act', in *The Manchester School*, May, 1949.

expansion in industry and trade, and for the fullest use and best distribution of labour and other resources.

2.

On December 1, 1950, the House of Commons ordered the Commission's first Report, on the supply of dental goods, to be printed. The Report deals largely with the activities and practices of the Association of Dental Manufacturers and Traders of the United Kingdom (A.D.M.T.) and of the Amalgamated Dental Co., Ltd. (A.D. Co.). The Commission report that members of the A.D.M.T., an association of manufacturers and retailers of dental goods, conduct about 90 per cent. of the trade, and that they conduct their affairs so as to restrict competition. It is reported further that the A.D. Co. and its subsidiary and associated companies, members of the A.D.M.T., alone handle just under one-half of the total trade. Thus the 'conditions' prevail to which the Act applies.

The Report outlines the structure of the industry, the historical developments leading to the formation of the A.D.M.T. in 1923, the rules and working of the association, and the working and policies of the A.D. Co. and its group. The whole forms an admirable survey of the industry. The practices of the A.D.M.T. are lucidly explained and the implications for the 'public interest' are cogently set out.

As regards the A.D. Co. the Commission analyse its dominant position in the supply of certain types of goods, and criticise some of its marketing arrangements and the high margins of profit obtained on some lines. The Commission recommend that the company should revise the prices and reconsider the marketing arrangements that they criticise.

The main interest of the Report lies in the analysis of the activities of the A.D.M.T. Manufacturer members of the association agree to fix the resale prices at which their dental goods are to be sold by dealer (retailer) members to the dental profession, and not to supply their goods to dealers outside the association. Dealer members of the association agree to maintain the resale prices fixed by the manufacturers, and not to buy 'essential' (*i.e.*, practically all) dental goods from manufacturers who are not members of the association. In addition competition between dealer members is discouraged except as regards quality of service, and membership of the association is limited in such a way as to make entry into manufacturing or retailing difficult. Members agree on penalties for breaches of the agreement entered into by themselves, and these range from expulsion from the association (and consequent boycott by the remaining members) to fines up to £1,000, or temporary deprivation of supplies at trade terms.

The Commission emphasise that what they call the 'exclusive dealing' and 'collective boycott' provisions of the A.D.M.T.'s

rules and regulations are the indispensable supports of the restrictive practices in the industry which they believe may operate against the public interest. By the first is meant the rules requiring members to confine their dealings to members of the association, which are in effect a permanent boycott of non-members. By the second is meant the potential boycott of members who are deemed to break certain of the association's rules. The power given to the association to obstruct the trade of non-members is considered to involve 'an extreme interference with the freedom of the subject to carry on any lawful business'. The power 'to deprive a member of most of his business (or to threaten to do so) if he breaks a trade association rule or agreement' is considered by the Commission to be 'an extra-legal penalty which would be out of proportion to the seriousness of the breach, even where the rule or agreement itself might be in the public interest'. The Commission conclude: 'When an association covering so large a proportion of the industry arms itself with these far-reaching powers, it becomes self-perpetuating because of the risk involved in leaving it, and there is no adequate safeguard to prevent it from restricting competition to an extreme degree, maintaining prices and margins at unnecessarily high levels, hampering the development of any progressive makers or traders outside the association and restraining and restricting innovations in methods of distribution by its members'.

As regards resale price maintenance the Commission's main objection is that the collective maintenance of prices is only made possible by 'exclusive dealing' and 'collective boycott', both of which the Commission find objectionable.

Having shown what undesirable results are possible, the Commission record that they 'have not found any very great abuse of the powers of the A.D.M.T.' in the past, and they attribute this to 'the moderation of the men who control it, rather than to the nature of its Rules and Regulations'. However, the rather generous view taken by the Commission of the past activities of the A.D.M.T. does not influence the Commission's findings or recommendations. They recommend 'that the A.D.M.T. should review its Rules, Regulations and policy and revise them' in the light of the Report. As regards action having statutory force, the Commission do not think it necessary to do more than to 'remove a few vital features' of the present organisation, so that the undesirable practices, lacking the necessary backing, will disappear. The vital features are 'exclusive dealing' and 'collective boycott', and the Commission recommend that they should be 'prohibited'.

3.

It is well known that the practices of exclusive dealing, collective boycott, and collective resale price maintenance are not peculiar to the supply of dental goods but are widespread throughout industry and trade. In the course of the last fifty or so years

judicial opinion and decisions have not disapproved of these practices, making a sharp contrast to the law's abhorrence of agreements in restraint of trade and of trade 'conspiracy' in bygone days.[2] The recommendations of the Monopolies Commission are in effect that the clock should be put back; and their recommendations will win the approval of the vast majority of economists. The Lloyd Jacob Committee on Resale Price Maintenance[3] had already in 1949 recommended that *collective* resale price maintenance should be abolished in all industries and trades; and this recommendation has been accepted by the Government.[4] The President of the Board of Trade had hoped that industry itself would take steps to rid itself of the practice; but he has confessed recently that he sees no prospect of the associations 'agreeing to bring their schemes to an end. The Government are considering what proposals it will be necessary to bring forward in these circumstances for the protection of the consumer'.[5]

The responsible authorities are now faced with several alternative courses of action. First, general legislation may be introduced designed to outlaw collective schemes governing the distribution and pricing of goods, and declaring trade combinations for the purpose of resale price maintenance and control over entry of firms to be illegal. Secondly, legislation may be introduced to deal specifically with the 'mischiefs' in the supply of dental goods. Two members of the Monopolies Commission in a note to the Report have indicated that 'although the Act makes provision for *ad hoc* legislation against a single industry' they are of the opinion that 'it would be wrong to enact *ad hoc* legislation against this industry', mainly on the grounds, apparently, that in a sense it would be unfair to penalise one industry when many others doing the same things are left undisturbed. The charge of unfairness is inevitable where anti-monopoly investigation and enforcement take place on an *ad hoc* basis.[6] In the present case it does not merit much consideration in view of the Government's earlier acceptance of the recommendations of the Lloyd Jacob Report. All trade associations practising collective price maintenance have had more than a year's notice that some at least of their practices and arrangements should be terminated. (The A.D.M.T. claims that its

[2] For an examination of the development of the law, see W. A. Lewis, 'Monopoly and the Law', in 6 M.L.R. 97.
[3] Report, Cmd. 7696.
[4] Parliamentary Debates, House of Commons, June 2, 1949, col. 2329.
[5] Parliamentary Debates, House of Commons, April 20, 1950, col. 370.
[6] The Board of Trade have indicated that their first 'references' to the Commission were chosen to 'cover a wide range of different types of allegedly restrictive practice' to 'enable a considerable section of industry to look at its trading practices in the light of authoritative judgments'. The intention seems to be that *ad hoc* investigations (and legislation?) should have wide 'educative' influence. See Annual Report by the Board of Trade, under the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, for the period ending December 31, 1949, p. 4.

main objective is the collective enforcement of resale price maintenance.) Thirdly, the responsible authorities may do nothing about the Report. The Monopolies Act does not lay down that the recommendations of the Commission must be carried out. Parliament may disagree with the Commission's findings or its recommendations. The most perfect instrument for the investigation of monopolies and restrictive practices cannot by itself remove the 'mischiefs' it may bring to light. There must be the will on the part of the responsible authorities to disturb existing arrangements and practices even though this may injure the interests of particular groups of employers and employed. The unanimous passing of the Monopolies Act may or may not be evidence of the necessary determination to act where 'mischiefs' have been discovered. The fate of the Commission's first Report will go some way to reveal how powerful the desire is to enlarge the opportunity for competitive enterprise in industry and trade.

4.

Assuming that something is to be done to prevent the continuation of the practices in the dental goods trade (or in industry generally), what legislative enactment is likely to be best suited for the purpose? An Act making the practice of 'exclusive dealing' and 'collective boycott' illegal would not prevent the individual manufacturer from choosing his customers and from maintaining his resale prices. It would not compel dealers to buy from any or all possible suppliers. It would merely make concerted action illegal; and there can be little doubt that without collective sanctions the restrictive features of the present arrangements would disappear in some circumstances without any (or serious) law-enforcement action. Some manufacturers and dealers would welcome the release from irksome restraints imposed upon them by the majority in their industry; and the knowledge of the law's hostility would in any case tend to weaken group solidarity. On the other hand in some cases—and there is insufficient evidence to decide whether the dental goods trade is a case in point—where the dominant firms are in favour of the retention of 'stability' and 'order', and where habits of group co-operation are strongly entrenched, it is possible that the life of restrictive arrangements may be prolonged even though the outward trappings of concerted action may have disappeared altogether. If manufacturer A refuses to sell his goods to dealer X, and if manufacturer B does the same apparently acting quite independently, and if A and B together control a substantial part of essential supplies, the results for X may be much the same as before. And if A and B decide not to supply X because he has patronised a manufacturer C, the results for C are much the same as before. The enforcing agencies or the courts may have to decide difficult questions as to whether

two or more firms have acted in concert in a prohibited manner, or should be deemed to have acted in this manner. Recent developments in American anti-trust case law reveal some of the ticklish problems involved.

There is another way of dealing with restrictive practices of the type under discussion. The Monopolies Act makes provision for this approach which amounts to no less than a drastic interference with the individual supplier's usual freedom to choose his customers as he pleases, by placing upon suppliers the obligation to supply all (or specified types of) willing and able buyers. The Act empowers the competent authority by order to 'declare it to be unlawful, except to such extent and in such circumstances as may be provided by or under the order, to withhold or agree to withhold or threaten to withhold . . . from any such persons as may be so specified or described, any supplies or services so specified or described or any orders for any such supplies or services . . . '. (The order may also declare it to be unlawful for the supplier to give preferential treatment to some buyers.) If such an order were made in respect of a particular type of goods infringements would be brought to light by aggrieved parties and the fact of infringement would normally be fairly easy to establish (though where supplies are short difficulties of proof and interpretation are likely to arise). A measure of this sort is clearly a powerful one. All manufacturers would have to supply all dealers and therefore dealers would have no incentive to refrain from buying from any manufacturer who offered the most attractive product and price. A measure of this sort is provided for in South African legislation [7] and was effectively applied to the distribution of petrol from 1931 to 1937.

5.

The Act provides that the procedure in carrying out an investigation 'shall be such as the Commission may determine'. In their Report the Commission describe how they investigated the dental goods industry. Information was gathered by means of questionnaires addressed to interested parties and to representative users of dental goods; a statistical and costing investigation of the industry was made; the A.D. Co. and A.D.M.T.'s records were fully examined; and the views of anyone interested in the inquiry were sought and examined. No public hearings were held. The A.D. Co. and the A.D.M.T. were consulted at various stages in the preparation of the Report.

Shortly after the Report was published the President of the A.D.M.T. expressed views highly critical of the procedure adopted

[7] Section 2 of Act No. 24, 1931; repealed, and replaced by section 4 of Act No. 59, 1949. In both Acts any supplier charged with an offence is deemed to have had supplies available at the material time unless he proves the contrary.

by the Commission. The serious criticisms were that the A.D.M.T. was not informed of all the evidence that the Commission had collected, was not able to cross-examine witnesses, and was not informed of the nature of the ' mischiefs ' which the Commission had in mind. The point was made that the Commission were both judge and prosecutor, and that there was danger of injustice unless the Commission's findings (that practices were against the public interest) ' be properly proved by the calling of evidence in public before a judicial tribunal '.[8]

Parts of the A.D.M.T. President's views may be dismissed as irrelevant. For example, the Commission is not ' a judge whose decision is final and binding '. No action may be taken except by Parliament, and it is not obvious that Parliament will automatically implement the Commission's recommendations. The danger is probably the reverse. On the other hand some of his criticisms are more searching. It is interesting to note that Professor W. A. Lewis, an economist of known hostility towards monopoly and restrictive practices, expressed doubts about the Commission's dual role and the secrecy of inquiries when the Act was passed.[9]

No method of monopoly investigation is without its limitations, and it is possible that alterations of the Act and of the Commission's procedures and methods may become necessary as experience is accumulated. In the meantime it should be stressed that the present arrangements minimise the possibility of injustice. The Commission are obliged to give reasons for their conclusions, and to provide a survey of developments in the investigated industry so that their conclusions may be properly understood. If any report should omit any material facts or arrive at conclusions which are incompatible with the disclosed facts, to the detriment of trade interests, the trade has the opportunity of publicising the omissions and deficiencies, and its comments would be considered by Parliament. The danger is rather that the ' public interest ' might be inadequately represented in the influencing of opinion should the Commission present any report that is unduly favourable to sectional interests. Moreover, most differences of opinion are likely to concern the interpretation of the ' public interest ' and not questions of fact (of the kind that can be settled by the ordinary judicial processes). It is certainly not obvious that the courts' view of the ' public interest ' will be a more desirable one than that of Parliament guided by the informed advice of an authoritative commission of investigation. Finally, the request for a judicial inquiry seems less urgent and less reasonable where the object of the investigation is to consider

[8] Letter in *The Times*, December 15, 1950.
[9] ' The British Monopolies Act ', in *Manchester School*, May, 1949.

the wisdom of new legislation than where it is to discover whether offences have been committed against existing legislation.

B. S. Yamey.

[Since the above was written a draft of an order to deal with the supply of dental goods has been prepared in the names of the Minister of Health and of the Secretary of State for Scotland. In the words of the Explanatory Note the order would render ' unlawful certain kinds of agreement which may be described broadly as those relating to the collective enforcement of resale prices in respect of dental goods, and those the effect of which is to restrict the number of persons carrying on business as suppliers of dental goods '.]

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NOTES OF CASES

Public Bodies and Private Law

There is a marked contrast in the treatment of public authorities in two recent cases. In *William Cory and Son, Ltd.* v. *City of London Corporation* [1950] 2 All E.R. 584, the question was simply what was the effect of the Corporation's legislative activity upon its own contracts. In 1936 the Corporation had made a contract with the company under which the latter was to carry refuse away to dumps in barges answering to certain specifications. The contract would, in the ordinary way, have run until 1969. However, in 1948, the Corporation as Port Health Authority passed a new bye-law, effective from November, 1950, under which all barges engaged in such traffic had to comply with specifications differing from those set out in the contract. The cost of altering the barges to the new standard was such as to render the further performance of the contract commercially impracticable. The company therefore claimed that they could treat the contract as repudiated by the act of adopting the bye-law and that they were therefore entitled to damages for breach. This claim was unhesitatingly rejected by Lord Goddard C.J. His argument was simple. The repudiation of a contract involves a wrongful act, but you cannot class as wrongful the acts of a public health authority passing a bye-law for the very purpose for which it was created. Similarly, of course, any claim to treat the frustration of this contract as induced by one party—the corporation—must likewise fail, since again no 'fault' can be shown. Two further matters were emphasised by the Lord Chief Justice. The bye-law was not specifically directed to the contract in question; it was of general application and its effect on the contract was only incidental. Secondly, he rejected the idea that the Corporation had two personalities, the one public as a subordinate legislative body, the other private, in which it had contracted. Such a dichotomy is unreal and is likely to lead to uncertainty and confusion. Instead, he found that it merely had various powers conferred for different purposes, and which might conflict. In this conflict precedence was given to the public powers and duties of the Corporation; the contract could not impede the discharge of those duties and must therefore be treated as frustrated.

In one sense it is perhaps arguable that the principle of the case would go further than the Lord Chief Justice was apparently willing to apply it. The emphasis on the incidental effect on the contract has already been noticed, yet it is conceived that even

if the contractors had been the only carriers of refuse in the port so that the contract had clearly been in contemplation when the bye-law was passed, provided that it was passed with a genuine health motive, the same result must follow. The result may at first sight seem harsh, but in effect such a solution only prevents the private contractor from deriving a benefit from having contracted with a public authority, since it places him in the same position as if the contract had merely been between private parties. Moreover, the application of the doctrines of frustration will serve to lessen the financial loss to the contractor while not imposing undue burdens or restrictions on the Corporation. The harshness of that ' uncompensated obedience to the police power ' insisted on in such cases as *Northern Pacific Ry.* v. *Duluth*, 208 U.S. 303, is thus here mitigated without impeding the power itself. The result may seem obvious, but at least it shows a recognition that public bodies are not in all respects like private ones.

In contrast, however, stands *Magor and St. Mellons R.D.C.* v. *Newport Corporation* [1950] 2 All E.R. 1226. It involved a dispute as to payment for increased burden as a result of local government boundary changes, a class of case now happily disappearing after the Local Government Act, 1948. By a Private Act of 1934, Newport Borough extended its boundaries and thereby became liable to pay compensation to two rural districts—Magor and St. Mellons. At the same time a Review Order was made coming into force on the same day as, but immediately after, the Act. Under this Order the two rural districts were combined in one. The short question was : could the new council claim the compensation which had been undoubtedly due to its component parts. The answer of the majority of the Court of Appeal was in the negative. With respect, that answer seems surprising. The increased burden fell upon two bodies of ratepayers; as a result of the fusion those same ratepayers together bore the same burden and if the claim were justified before the fusion in logic it seems equally justifiable afterwards. The only change perceptible to them was that the body carrying out local administration in their district now had a different name. To the lawyer perhaps the answer may not be so surprising. Cohen L.J. (with whom Somervell L.J. concurred), while admitting that the right to compensation was ' property ' of the old authorities, and as such vested in the new one, denied that that property had any value. The new authority was to be treated as an assignee (*ex hypothesi* it itself having had no previous existence could not suffer an increase of burden); *qua* assignee, however, it could claim no greater rights than the assignors and the assignors' rights ceased to have value once the assignors ceased to exist since, under s. 152 of the Local Government Act, 1933, regard must be had to the length of time during which the burden may be expected to continue, and they could not be burdened after they ceased to exist. Within the strict limits

of law that answer cannot perhaps be challenged, but it involves the acceptance of the existence of the two corporations as entities entirely detached from their purposes, a detachment which is all the easier since the ratepayers are not incorporated. There is, however, much that is attractive in the dissenting judgment of Denning L.J. where he pointed out that those who in fact suffer the burden are not the authorities but the ratepayers, who continued. The councils in their own right were not entitled to anything beneficially. So far as this case concerns compensation payments, it is of little lasting value. What is of interest is the contrasting attitude to public bodies of the Lord Chief Justice and Denning L.J. on the one hand and the majority of the Court of Appeal on the other. In the judgments of the former in the two cases there is a recognition of the specific 'public' character of such bodies as local authorities and effect is given to that recognition. In the second case the majority appear to rely almost exclusively on the analogy of private law situations, an analogy which, it is at least arguable, frustrates the purpose of the legislative scheme. Indeed it is noticeable that Denning L.J. was moved to comment: 'We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis'. Perhaps, without disrespect, it may be suggested that the analysis and attitude of the Lord Chief Justice in the former case is most likely to help this reasoned working of the law in recognising that the analogies of private law will not always give a happy solution.

J. D. B. Mitchell.

Certiorari and Speaking Orders

Few judgments in recent years have aroused more widespread interest than that of the Divisional Court in *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1951] 1 All E.R. 268. In ordering *certiorari* to issue to quash the decision of the tribunal because of error of law apparent on the face of it, the court revived an almost forgotten doctrine of judicial review which enables the courts to exercise what is in effect an appellate jurisdiction in relation to the reasoned decisions of inferior tribunals.

The applicant, who had been employed as a clerk to a joint hospital board, lost his post as a result of the passing of the National Health Service Act, 1946. Regulations made under the Act (S.I. 1948, No. 1475) provided for the establishment of a compensation authority to determine claims arising out of loss of office, with a

right of appeal to a compensation appeal tribunal. The applicant, aggrieved by an award made to him by the authority that was upheld by the appeal tribunal, moved for *certiorari* to quash the decision of the appeal tribunal. Lord Goddard C.J., delivering the judgment of the Divisional Court, held that the reasons given in the document in which the tribunal announced its decision were bad, in that they showed that the tribunal had misconstrued the relevant provisions of the regulations dealing with the basis for awarding compensation; and that *certiorari* would issue to quash the decision.

That *certiorari* lies to quash an order which bears an error of law on its face is unquestionably good law. It is true that dicta of the Court of Appeal in *Racecourse Betting Control Board* v. *Secretary of State for Air* [1944] Ch. 114 deny this; but, as the Lord Chief Justice pointed out in the present case, they are inconsistent with the decisions of the House of Lords in *Walsall Overseers* v. *London & North Western Ry.* (1878) 4 App.Cas. 30 and of the Judicial Committee of the Privy Council in *R.* v. *Nat Bell Liquors, Ltd.* [1922] 2 A.C. 128, which had not been cited to the Court of Appeal, and the Divisional Court was therefore entitled to disregard those statements as having been made *per incuriam*.[1] Lord Goddard traced the history of *certiorari* to quash, basing his account largely on the classic judgments in the *Walsall* and *Nat Bell Cases*. *Certiorari* has long issued to bring up the convictions and orders of inferior courts [2] for review. But the reviewing court would have regard only to those proceedings of the inferior court that were brought before it as constituting the 'record': the rule was, and is, that extrinsic evidence could not be produced to supplement or impugn the record, unless want of jurisdiction, bias, interest or irregularity of procedure (or, it may be added, fraud) were alleged. At first the proceedings on summary convictions before justices had to be set out at great length, and convictions were quashed not only for errors of substantive law but also for trivial formal defects. Parliament retaliated by taking away the right to a *certiorari* in a number of statutes creating summary offences—a device that was not wholly successful in excluding judicial review—and finally by prescribing, in the Summary Jurisdiction Act, 1848, a standard form of conviction that omitted all mention of the evidence or the reasoning by which

[1] Applying *Young* v. *Bristol Aeroplane Co., Ltd.* [1944] K.B. 718. Passages in the Lord Chief Justice's judgment may suggest that the decision itself in the *Racecourse Betting Control Board Case* was wrong. But the *ratio decidendi* of that case, which was that the General Claims Tribunal was not an arbitration tribunal so that the special procedure for setting aside the awards of arbitration tribunals (R.S.C., Ord. 52, r. 4) was inapplicable to it, seems to be unaffected by the present decision.

[2] His Lordship erred in saying (at 276) that the old writ of *certiorari* seldom issued to a court of record. Until 1600 *certiorari* would not issue (save for certain special purposes) to any court *except* a court of record; writs of false judgment and *pone* issued to bring up the proceedings of courts not of record.

the justices reached their decision. This did not alter the law relating to *certiorari*, but it made it impossible for the courts to correct errors of law made by justices except errors that went to their jurisdiction. 'The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record "spoke" no longer; it was the inscrutable face of a sphinx' (*per* Lord Sumner in *R.* v. *Nat Bell Liquors, Ltd.* [1922] 2 A.C. at 159).

The judgment in the present case does not bring out the point that there had always been a *practical* distinction between the scope of review available in the case of orders made by justices and the scope of review in the case of summary convictions. The courts did not require justices to set out the evidence and the grounds of decision in *orders* made by them; 'speaking orders', orders that told their own story, were rare, as they are today, though where the order set out the reasons *certiorari* would issue to quash it if the reasons were bad in law: *Ricelip Parish* v. *Henden Parish* (1698) 5 Mod. 416. Where the Court of King's Bench was able to quash an order for patent error of law it was usually because the justices at quarter sessions had exercised their common-law power to make an order subject to a special case stated for the opinion of the court. The special case was annexed to the order and, although in reality a separate document, it was regarded as forming part of the order, which was reviewed as if it were in fact a 'speaking order'.[3]

It is clear, then, that the present decision on the scope of *certiorari* is but the latest exemplification of a long-established principle. Orders and convictions by justices are unaffected by the decision; their inscrutability is protected by the following of prescribed statutory forms, and in any event Acts of 1857, 1879 and 1925 enable appeals to be taken to the Divisional Court by way of cases stated on points of law. Whether the decision will result in a substantial increase in judicial control over administrative tribunals is not easy to forecast. Now that practitioners have been reminded of the efficacy of *certiorari* in relation to 'speaking orders' more cases like the present one will doubtless come before the courts. But administrative tribunals are hardly ever under a statutory obligation to issue formal reasoned decisions unless appeals lie from them to the courts or superior administrative tribunals; and in the absence of legal compulsion few tribunals have succumbed to the pressure of moral obligation, though it is noticeable that the practice of giving reasons has grown somewhat of late. One wonders how many tribunals will accept the Lord Chief Justice's offer made (at 278) on behalf of the Divisional Court, to 'give guidance to them if they make their orders speaking orders, so

[3] See F. H. Newark (1949) 8 N.Ir Leg.Qu. 102, 107f. for the best account of the special case. Until 1879 the method of removing the order and special case to Westminster was by *certiorari*.

that this court can then deal with them if they are brought before this court on *certiorari*'. The Divisional Court is unlikely to be overwhelmed by the response. It may be that some tribunals will prove so unappreciative as to show less readiness to give detailed reasons for their decisions.

Three further points suggested by the decision call for comment:

(1) What is the position where the formal decision of an administrative tribunal sets out no reasons, but oral reasons are given by the tribunal which show that the tribunal has erred in law? The answer would seem to be that *certiorari* will not lie in such a case unless the error goes to the jurisdiction of the tribunal. In our hypothetical case the oral reasons do not form part of the 'record'.[4] On the other hand, the oral statement may be admissible in an application for *mandamus* to hear and determine according to law, for it may show that the tribunal has taken an irrelevant consideration into account or has failed to take a relevant consideration into account in arriving at its decision.[5]

(2) What if the evidence is set out in the order and the court is of the opinion that it is insufficient to support the decision? This situation may seldom arise, but the proper rule seems to be that if there is any evidence upon which reasonable persons could possibly have come to such a conclusion the decision of the tribunal should be upheld.[6]

(3) What if it is provided by statute that the decision of the tribunal shall be 'final' or 'conclusive'? The common-sense answer is that these words mean what they say and that the order of the tribunal is unimpeachable unless, possibly, it is totally outside its jurisdiction. The point may be an important one; for example, the Minister of Local Government and Planning usually gives reasons for his decisions under certain important sections of the 1947 Act which provide that his decision shall be final. There is admittedly venerable authority for the proposition that *certiorari* cannot be taken away without express words to that effect; on the other hand, in recent cases where different remedies have been sought[7] 'finality' clauses have been held to preclude resort to the courts, and there is no sound reason why such clauses should be ignored merely because the remedy sought is *certiorari*.

S. A. de Smith.

[4] Cf. argument of the Solicitor-General [1949] 1 K.B. 666 at 671.

[5] The point is especially important in regard to rent tribunals. In the well-known *Block Reference Case* [1949] 1 K.B. 666, had *mandamus* been applied for it might have issued to the tribunal because it had erred in refusing to take into account, when fixing the rents, certain services provided by the landlords. It has been suggested (12 M.L.R. 363) that the reasons for quashing the decision of the tribunal in that case by *certiorari* were misconceived.

[6] See *R.* v. *Glossop* (1821) 4 B. & Ald. 616; this is in conformity with the scope of review on appeals by way of case stated.

[7] *Wilkinson* v. *Barking Corporation* [1948] 1 K.B. 721 (action for a declaration); *Hall* v. *Arnold* [1950] 2 K.B. 543 (case stated).

Sale of Land—Reasonable Time for Completion

A case that injects some uncertainty into land sales is *Smith* v. *Hamilton* (1950) 66 T.L.R. (Pt. 2) 937. The plaintiff here had contracted with defendants, through their agents, on February 26, 1949, for the purchase of a house, belonging to defendants, for the price of £3,000. She paid a deposit of £300, and under the terms of the contract it was provided that completion was to take place on April 4, 1949, and, further, that 'If the purchaser shall neglect or fail to complete his purchase according to these conditions, his deposit shall thereupon be forfeited (unless the court otherwise directs) to the vendor . . . and the vendor may, with or without notice or without previously tendering a conveyance, re-sell the property at such time, in such manner, and subject to such conditions as he shall see fit'. The plaintiff was unable to raise the remainder of the purchase price as building societies would not grant a 90 per cent. mortgage on the sole security of that kind of house; and on March 29, plaintiff's solicitors informed the defendants' solicitors that she would be unable to complete the purchase on the fixed date. The defendants (through their solicitors) wrote that they 'cannot agree to an extension of time to complete and that they reserve all their rights under the contract of sale. They are, however, prepared without prejudice to delay exercising such rights until April 19 . . .'. By April 19, the plaintiff was still not in a position to complete, whereupon defendants informed her that the deposit had become forfeited and that they were proposing to exercise their right of re-sale forthwith. And so they did on April 21. After the renunciation of the contract by defendants, the plaintiff's husband took a hand in the matter as a result of which her solicitors could offer May 4, 1949, as a date for completion. But the property, as aforesaid, had already been sold to a third party.

The plaintiff sued for return of deposit and damages for breach of contract. The defendants counterclaimed for breach of contract by the plaintiff.

The court had no difficulty in finding, and one can have no quarrel with Harman J. on that point, that the time fixed in the contract was not of essence, and though the parties 'named a specific time within which completion was to take place, they really and in substance intended no more than that it should take place within a reasonable time'[1]; but one may be reluctant to follow the court in stretching this to mean 'that the purchase shall be completed on April 4 or within a reasonable time *thereafter*' (on p. 943). Holding that an extension of 14 days was not reasonably long, Harman J. found the defendants in breach of contract and gave judgment for the plaintiff.

[1] Citing Lord Haldane in *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1915) 32 T.L.R. 156.

The court was confronted with the task of deciding whose conduct of the parties to the contract had been unreasonable. Harman J. relied heavily on *Green* v. *Sevin*,[2] though that case can hardly be considered as embedded in a similar factual situation. There, no time had been fixed for completion, and after the vendor's own delay of two years he suddenly gave 18 days' notice to the purchaser. Dicta in that case must also be viewed against this factual background, detached therefrom they are not a sure guide of the law. In the case under discussion the parties had fixed a five-weeks' period for completion (the parties themselves are usually good judges of what is reasonable under the circumstances), and the court did not find that period unreasonable, as in fact it did not pronounce on that point at all. The ratio decidendi seems to be summed up in the following words: 'I can find no instance where a delay, as short as a fortnight, has been held to entitle either the vendor or the purchaser to rescind'.[3] In 1879 (the year of *Green* v. *Sevin*) two weeks or 18 days may have been an unreasonably short period in the conveyancing practice of those days, but is the same still true today? Is it necessary to say that, because 18 days were found to be too short an extension in the conveyancing practice of 70 years ago, such period would be too short for all times to come as a rule of law. It is not uncommon in today's practice to raise the purchase money and complete within ten days after the conclusion of the contract. Is then this change of any importance in considering what is a reasonable time or does the law still require the periods of the horse-and-buggy age? It is submitted that in deciding whether or not an extension of time is reasonable the court should have regard to the factual situation as it exists today, and to take into account the time already elapsed, what is still to be done and give due consideration to the reason necessitating the delay beyond the fixed time. There is good authority to support this view. Lord Atkinson said in *Stickney* v. *Keeble*[4]: 'I feel myself quite unable to assent to the two propositions following, . . . (2) . . . so that the defaulting vendor may do nothing to complete during its currency (reasonable time) and yet be entitled to get a reasonable time after its termination to do all that the law intended he should do while it was running'.

The purchaser having failed to raise the purchase price in seven weeks (an otherwise reasonable period for that purpose), what is to make the vendor believe that she will raise it in the next two, four or six weeks? Is he to pass over other prospective purchasers that are able to pay without difficulty? It is submitted that this would work hardship on the vendor who had contracted with an impecunious purchaser.

J. Oliner.

[2] (1879) 13 Ch.D. 589.
[3] At p. 942.
[4] [1915] A.C. 386 at p. 404.

Married—or Unmarried?

In *Risk* (*otherwise Yerburgh*) v. *Risk* [1] a woman, who in 1938, when a domiciled Englishwoman, had gone through a ceremony of marriage according to Moslem rites at Alexandria with a man of Moslem faith domiciled in Egypt, petitioned for a decree of nullity on the ground that at the time of the ceremony, when she was domiciled in England, she was incapable of contracting a polygamous marriage, and therefore that the marriage was void *ab initio*. Barnard J., after a fortnight's consideration, held, following *Hyde* v. *Hyde*,[2] that the court could not entertain the suit, since a party to a polygamous marriage was not entitled to an adjudication in accordance with the law of England. Since the marriage was contracted in Alexandria, the decision seems also in accordance with Denning L.J.'s reasoning in *Kenward* v. *Kenward*.[3]

The implications of any different decision would indeed have been far-reaching. The headnote to the report describes the petitioner at the time of the marriage as an Englishwoman domiciled in England; since the British Nationality Act, 1948, however, there appears to be no legal definition of an Englishman (or woman), there are only citizens of the United Kingdom and Colonies, who may be domiciled in England or elsewhere. Thus no distinction appears possible on nationality grounds between the citizen of English origin and the citizen originating from other parts of the United Kingdom or from the Colonies—among the latter many (probably a majority) are adherents of religions recognising polygamy.

In his judgment Barnard J. did not advert to the question of nationality, but (according to the All England Report) he described the petitioner as of the Christian faith and domiciled in England, thus importing a reference to, though not deciding the case by, a religious test which many 'Englishmen' might have difficulty in satisfying.

An important difference between *Hyde* v. *Hyde* (*supra*) and *Risk* v. *Risk* (*supra*) is, however, that in *Hyde* v. *Hyde* the petitioner, who had gone through a Mormon ceremony of polygamous marriage, was petitioning for the dissolution of the marriage on the ground of his wife's adultery, whereas in *Risk* v. *Risk* the petitioner was applying merely for a declaration of nullity. However, as Barnard J. pointed out, even on a declaration that a marriage is void *ab initio*, questions of maintenance and of custody of children may arise, and the English courts are not designed for the solution of such questions arising from polygamous marriages.

The two questions which thus arise are whether anyone in the position of the petitioner in this case is (a) free to marry another

[1] [1951] P. 50; [1950] 2 All E.R. 973. [2] (1886) L.R. 1 P. & M. 130.
[3] (1950) 66 T.L.R. (Pt. 2) 157, 172, noted M.L.R. (1951) Vol. 14, p. 77.

in this country, and (b) indictable for bigamy on any such attempted subsequent marriage.

In *Srini Vasan* v. *Srini Vasan*,[4] Barnard J. recognised the validity of a marriage according to Hindu rights of a Hindu domiciled in India to the extent of holding his subsequent marriage to another woman in England to be a nullity, and in *Baindail* v. *Baindail*[5] the Court of Appeal affirmed a similar decision by Barnard J. even though here the Hindu had, between the marriage in India and the marriage ceremony in England, acquired an English domicil. The only difference, therefore, between *Baindail* and *Risk* is that in *Baindail* the party to the polygamous marriage was domiciled in India at the time of the marriage, whereas in *Risk* she was then domiciled in England. It would therefore appear highly probable that any subsequent marriage in England in circumstances such as the *Risk Case* would be void by English law.

The question of bigamy where a polygamous marriage is followed by a monogamous one has never been squarely faced by the English courts. It is noteworthy that in neither the *Srini Vasan* (*supra*) nor the *Baindail* (*supra*) cases does there appear to have been any prosecution for bigamy, and in *Baindail* v. *Baindail*, Lord Greene M.R. said[6]: 'Nothing that I have said must be taken as having the slightest bearing on the law of bigamy. On the question of whether a person is "married" within the meaning of the statute (which is a criminal statute) when he has entered into a Hindu marriage in India I am not going to express any opinion whatever. It seems to me a different question in which other considerations may well come into play. I hope sincerely that nobody will endeavour to spell out of what I have said anything to cover such a question'.

In *R.* v. *Naguib*,[7] N. was indicted for marrying Y. in England during the subsistence of his English marriage to X. In reply he pleaded that his marriage with X. was invalid because it was contracted during the subsistence of his (polygamous) marriage under Egyptian law with A., whom he had divorced after the marriage to X and before the marriage to Y. Avory J. held that there was insufficient evidence of the valid Egyptian marriage to A., but further adopted the statement by Westlake[8] that 'Where the *lex loci contractus* allows polygamy, marriage under it, even in the case of a first wife, is a different thing from monogamous marriage, and will not be regarded in England as a marriage'. In the Court of Appeal, Avory J.'s first ground of decision was affirmed and the latter point left open to vex the judges of the future. Open it remains today.

O. M. Stone.

[4] [1946] P. 67.
[5] [1946] P. 122.
[6] At p. 130.
[7] [1917] 1 K.B. 359.
[8] *Private International Law* (5th ed.), Chap. 4, s. 34, p. 73.

Stealing One's Own Property

The singularly inconsistent application of the doctrine of possession in English law has provided many headaches and proved a fertile source of dispute among generations of lawyers. In criminal law, the Larceny Act, 1916, provides a happy hunting ground for those who share the view that consistency in applying the principles governing possession is significant by its absence. A recent illustration is the decision in *Rose* v. *Matt* [1951] 1 All E.R. 361, where the Divisional Court held that the owner of goods who has entrusted them to another person, in such circumstances that that other person has a special property in the goods, is guilty of larceny if he fraudulently takes them away from that person.

M. had bought some goods from S. but was unable to pay for them at once. Wanting to obtain immediate delivery of the goods, M. offered his travelling clock as security for the purchase price, which S. accepted on condition that unless M. paid for the goods in cash within one month S. was free to sell the clock. M. agreed to this condition and was allowed to take the goods away. Failing to raise enough money M., some time later, returned to S.'s shop and surreptitiously removed the clock, as he put it, to prevent S. from selling it but with no intention of charging S. with its loss.

M. was charged with simple larceny of the clock. The Divisional Court pointed out that S. had a 'special property' in the clock, insomuch as he had the right to hold it as security against the purchase price. By taking the clock away within the stipulated month—not having paid the purchase money—M. intended to, and did in fact, deprive S. of his special property by preventing S. from exercising the right he would otherwise have had of selling the clock.

It is clear that at the time of M.'s removal of the clock, he was still its true owner. If we look at the definition of larceny, in section 1 (1) of the Larceny Act, which says:

> 'A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof . . .'

it would seem that, on the face of it, an owner is incapable of stealing his own goods. However, the interpretation of the word 'owner' for the purposes of the Act is elastic, and by section 1 (2) (iii), it is provided that:

> 'the expression "owner" includes any part-owner, or person having possession or control of, or a special property in, anything capable of being stolen'.

The Divisional Court were of the opinion that, on the facts before them, S. had a sufficient 'special property in' the clock to fall within the statutory interpretation of the word 'owner' and could, therefore, successfully maintain a charge of larceny against M., the true owner.

The importance of this case lies not so much in the actual decision, as in the fact that it focusses attention on the following two controversial questions.

(1) What is the degree of possession to which the law of larceny affords protection?

(2) What is the degree of *mens rea* which a true owner must exhibit when charged with stealing his own goods?

Let us examine these two problems in the light of the decision in *Rose* v. *Matt*.

(1) *The degree of possession which the law of larceny protects*

Lord Goddard in *Rose* v. *Matt* was concerned to point out that, in construing the Larceny Act, 1916, if the words of the statute were clear then the decision of the court must be governed by the provisions of the Act. Only in the event of doubt or uncertainty could resort legitimately be made to the old cases on larceny. It is submitted that this particular problem can only be solved by reference to the common law.

We have already seen that, in its interpretation of the word 'owner' in the definition of larceny, the legislature has laid down what 'title' a person dispossessed must show in order to maintain successfully a charge of larceny. So far as the common law is concerned, it has long been recognised that mere ownership of the goods stolen is not, in itself, sufficient. If, however, the true owner is also the possessor of the article, his claim to protection under the law of larceny is far more sure. The question remains, what is the requisite degree of possession?

The statute says that a person having a 'special property' is deemed to be an owner. So far as is known there are only two cases in the reports in which this nebulous formula has been used to justify a charge of larceny. One of the two cases is that under review, *Rose* v. *Matt*, in which, as we have seen, a shopkeeper was deemed to have a special property in the clock deposited as security for the purchase price. Now, it is evident that in depositing the clock with the shopkeeper its owner was creating a bailment and, moreover, a bailment for value, under which legal possession in the chattel became vested in the bailee. Until the owner of the clock paid for the goods purchased, the shopkeeper had a right to exclude him absolutely from the clock. In short, the bailee for value—the shopkeeper—had legal possession of the clock *vis-à-vis* the whole world, including the bailor—the true owner.

It is generally recognised at common law that to dispossess a legal possessor of an article, without a claim of right, is larceny. That principle remains good where the legal possessor is a bailee for value, and the dispossessor is the bailor, the true owner. This conclusion was upheld as long ago as 1821 in *R.* v. *Wilkinson and Marsden*, Russ. & Ry. 470, referred to in *Rose* v. *Matt* and to which

we shall turn again later. The headnote to *Wilkinson* accurately represents the majority decision (seven judges to four) which held that if a man steal his own goods from his bailee, if the bailee had an interest in the possession and could have withheld it from the owner, the taking is a larceny.

The decision in *Rose* v. *Matt* is, therefore, entirely in accordance with the common law concept of larceny and represents no departure from recognised principles. To refer to the shopkeeper as having a ' special property in ' the article stolen is unnecessary. The shopkeeper had legal possession of the clock and that has always been a sufficient degree of possession to sustain a charge of larceny.

The other case to which reference must be made is that of *R.* v. *Harding* (1929) 21 Cr.App.R. 166 which has been the subject of widespread criticism.[1] The accused in that case had broken into a house and attacked a maid, forcing her to hand over a mackintosh belonging to her employer who was, at the time, in the garden. The accused was convicted of robbing the *maidservant* of the mackintosh, and it was held by the Court of Criminal Appeal that to sustain an indictment for robbery the person robbed need not be the owner of the chattel taken. A ' special property in ' the chattel was sufficient : this the maid had and, therefore, the conviction was upheld.

What meaning was attributed in *Harding* to the phrase ' special property ' ? It is submitted that the maid did not have legal possession of the mackintosh, she only had physical possession, *i.e.*, custody of the chattel. To maintain that the maid had legal possession of the mackintosh is to propound a principle directly contrary to the centuries-old rule that where a servant is entrusted *by* his master with the care of his master's goods, the servant only has custody of the goods.

We are thus confronted with two conflicting interpretations of the formula ' special property '. In *Harding* it was used to describe the maid's *custody* of her employer's mackintosh, whereas in *Rose* v. *Matt* it was applied to the shopkeeper's *legal possession* of the travelling clock. Which of these interpretations is correct ? It is no answer to say that *Harding* is a case of robbery, whereas *Rose* v. *Matt* is a case of larceny. Surely the degree of possession which must be shown in the person dispossessed is the same in both offences, robbery merely being a forcible taking either through fear or by violence. Can it be that the phrase ' special property ' was intended to cover both legal possession and custody ? If so, what is the purpose of the alternative formula ' possession or control of . . . ' ?

According to the statute a person having ' control or possession ' is regarded as an owner. The term ' control ' gives rise to difficulties in connection with cases involving the custody of goods by a servant,

[1] See 46 *Law Quarterly Review*, p. 135, and *Current Legal Problems*, Vol. 3, at pp. 136–138.

but, since the point is not germane to the case under review, it cannot be discussed fully here.[2]

(2) *The degree of* mens rea *which a true owner must exhibit to sustain a charge of stealing his own goods*

In the ordinary case of larceny the Act defines the requisite *mens rea* as ' an intent permanently to deprive the owner thereof '. Some textbook writers have indicated that this requires proof of an intent to deprive the *true* owner. Where the accused is himself the true owner, this version of the *mens rea* obviously requires adjusting.

Such a contingency arose in *Rose* v. *Matt*, where reference was made to the earlier authorities in which the fictitious *animus furandi* varied from an intent to charge the bailee in an action of detinue,[3] to an intent to expose the bailee to a penalty payable under a bond,[4] or even to an intent to defraud the Crown.[5] The Divisional Court, however, stated that if the owner's taking from the bailee was fraudulent that would suffice. No indication was given as to the limits of such fraudulent intention, but it is suggested that it must be principally tested with reference to the normal test of an intent permanently to deprive the owner, adopting the interpretation of the word ' owner ' applicable to the special facts of each case.

Thus, where an owner steals his own goods from a bailee for value, it must be shown that the owner's intention was to deprive the bailee of his legal possession and, in so doing, prevent the bailee from exercising his rights under the conditions of the bailment.

Assuming the correctness of the proposition that a master can steal his own goods from his servant, what is the *animus furandi* in such a case? Is it enough to prove the master's intention to determine prematurely and permanently the servant's custody of the goods? Surely not, otherwise the door is thrown open to any servant, with a grouse against his employer, to charge his master with larceny should the master decide to discontinue entrusting goods to the servant. May it not be that the fraudulent intention of the master in such a case will have to be proved as against a third party, *e.g.*, an intent to make a bogus claim for alleged theft to an insurance company?

[2] ' Possession,' it is suggested, means legal possession, and the words ' control of ', if intended to have a separate meaning, signify custody. Such an interpretation leads to the surprising result that an owner can be convicted of stealing his own goods from his servant, who has custody of his master's goods. So far as is known, there is no reported case on the point though East in his *Pleas of the Crown* (at pp. 556 and 654) says that such a ruling would be correct because the servant has a ' special property in ' the goods. It will be noted that, as in *R.* v. *Harding* (*supra*), East uses the phrase ' special property ' to describe custody, an interpretation in direct contrast with that given in *Rose* v. *Matt*. One is prompted to ask: What other Machiavellian interpretations remain to be dug out of the Larceny Act?

[3] 1 Hale 513.

[4] *R.* v. *Wilkinson and Marsden* (1821) Russ. & Ry. 470.

[5] *Ibid.*

Finally, let us consider the question of *mens rea* on facts slightly different from those in *Rose* v. *Matt*. Supposing that, while the clock was in the shopkeeper's hands, some thief—other than the true owner of the clock—wrongfully takes it away, with no intention of keeping it permanently but intending to use it and then return it. In fact, the thief keeps the clock for the whole of the stipulated month and then, discovering who is the real owner of the clock, returns it to him. Two possibilities require consideration.

In the first place, is the thief guilty of larceny against the true owner? Assuming it is proved that when he took the clock the accused had no intention of permanently keeping it, it is evident that in regard to the true owner, there was no *animus furandi* at the time of 'taking'. It follows that larceny against the true owner cannot be sustained.

Alternatively, is the thief guilty of larceny against the shopkeeper, the bailee for value? It is suggested that the answer depends on whether or not the thief has knowledge of the bailment, at the time of 'taking'. Thus (i) if the thief *did not know of the bailment* and took the clock away intending to return it at the end of the month, which he does, how can there be a fraudulent intent to prevent the bailee for value from exercising his rights under the bailment? In such circumstances, it is submitted, there is no larceny against the bailee. (ii) If, however, the thief *knew of the bailment* at the time of 'taking', his keeping the clock for the stipulated month would indicate an original fraudulent intent to deprive the bailee of his legal possession, and his rights under the bailment. That, as we have seen in *Rose* v. *Matt*, is sufficient for larceny.

Enough has been said to indicate that, however strongly the courts may seek to rely solely on the Larceny Act, 1916, to find what amounts to stealing, the problems lurking beneath its provisions ought not to, and cannot, be solved without resort to the common law principles of larceny.

J. Ll. J. Edwards.

Stare Decisis in the Divisional Court

The doctrine that the Divisional Court is bound by its own decisions, which was laid down by Lord Goddard C.J. in his judgment in *Police Authority for Huddersfield* v. *Watson*,[1] has not been allowed to languish untended; *Nicholas* v. *Penny*[2] is the most recent of several cases in the Divisional Court in which the Lord Chief Justice has personally affirmed and extended the principle and more precisely delimited its application.

[1] [1947] K.B. 842, and see M.L.R. (1948) Vol. 11, p. 95.
[2] [1950] 2 K.B. 466.

In *R.* v. *Porter*,[3] *Younghusband* v. *Luftig*[4] and *Nicholas* v. *Penny*[2] the Lord Chief Justice has repeated that the Divisional Court is bound by its own decisions in exactly the same way and subject to the same exceptions as the Court of Appeal is bound under the rule in *Young* v. *Bristol Aeroplane Co.*,[5] and in *R.* v. *Porter*[3] he added that 'if the Divisional Court finds that the House of Lords has given a decision which is manifestly inconsistent with an earlier decision of a lower court, whether there has been express overruling of the earlier case or not, the Divisional Court ought not to follow it. . . . This will include the case where only one member of the House of Lords has expressly stated that the earlier decision was wrong, but the Divisional Court can see that all the Lords who took part in the debate found that the reasoning was wrong'.

The difficulties arising in the Court of Appeal from the doctrine of implied overruling are considerable,[6] and this exception to the rule in *Young* v. *Bristol Aeroplane Co.*[5] undoubtedly detracts from the certainty of the law, which *stare decisis* seeks to promote. The last part of Lord Goddard's ruling quoted above, however, would seem designed to avoid such rigidity as was shown by the Court of Appeal in *Consett Industrial and Provident Society, Ltd.* v. *Consett Iron Co., Ltd.*,[7] where that court held itself bound by its own previous interpretation of an Inclosure Act of 1773, although in the meantime in the House of Lords another Inclosure Act of 1757 had been interpreted in a different way; one member of the Lords considered the interpretation of the 1773 Act in the Court of Appeal to be wrong, and two thought it distinguishable, but the whole trend of the argument in the Lords was contrary to that used in the Court of Appeal. According to Lord Goddard's ruling, however, only one member of the Lords need have 'expressly stated' that the earlier decision was wrong, but 'the Divisional Court can see that all the Lords who took part in the debate found that the reasoning was wrong'; that is, all but one of the Lords must be seen to have found something which they did not expressly state. This seems to call for no small measure of ingenuity from the Divisional Court in interpreting their Lordships' judgments.

The Lord Chief Justice is certainly not unaware of the possible hardship inherent in the doctrine that a Court of Appeal is bound by its own previous decisions. Thus in *Moore* v. *Hewitt*[8] the Divisional Court considered itself bound by the decision in *Johnson* v. *Pritchard*, of which reports had appeared only in the *Justice of the Peace Newspaper* and the *Law Times Newspaper*, and the

[3] [1949] 2 K.B. 128, 132, 133.
[4] [1949] 2 K.B. 354, 361.
[5] [1944] K.B. 718.
[6] See *Cambridge Law Journal* (1947), p. 349 and (1950), p. 432.
[7] [1922] 2 Ch. 135.
[8] [1947] K.B. 831, 841.

Lord Chief Justice remarked[8]: 'I hope that *Johnson* v. *Pritchard* may some day be considered in a higher court, but sitting in this court I think we are bound by it, although we have not had the advantage of seeing any report which shows the reasoning of the court'. The fact that the Divisional Court is the final court of appeal for cases tried before justices has been stressed elsewhere by the Lord Chief Justice as a reason for holding it bound by its own decisions, and it is a little curious that he should here express a hope for review in a higher court.

In the Court of Criminal Appeal, however, the Lord Chief Justice has recently stressed the different considerations attaching to the doctrine of *stare decisis* in civil and in criminal matters, and in *R.* v. *Taylor*[9] he laid down: 'This court has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that, in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which has been previously given, and that, on the strength of that decision, an accused person has been sentenced and imprisoned, it is the bounden duty of the court to reconsider the earlier decision with a view to seeing whether that person has been properly convicted. The exceptions which apply in civil cases ought not to be the only ones applied in such a case as the present'. The Divisional Court also deals with precisely similar questions involving the liberty of the subject, but there the exceptions which apply in civil cases have been laid down as the only ones admissible; moreover, it would seem that the Lord Chief Justice has himself expressly closed any possible escape from the binding force of previous decisions in that court by the expedient of summoning a full court to overrule an undesirable decision. Thus whereas in *Edwards* v. *Jones*,[10] speaking of a previous Divisional Court decision in *Rodgers* v. *Richards*[11] the *All England Reports* quote him as saying: 'I should have no hesitation, if necessary, in differing from the decision in that case, not *merely*[12] because we are sitting now as a court of three and that was a court of two, but *also*[12] because the case was not argued for the defendants, who did not appear and when a case has been argued only on one side, it has not the authority of a case which has been fully argued', in the *Law Reports*, the words *merely* and *also* are omitted. More definitely in *Younghusband* v. *Luftig*[13] he said: 'A Divisional Court of five judges has no greater powers than one of three or even two. This court is bound by its own decisions as is the Court of Appeal, whatever the number of judges that may constitute it', nevertheless 'when re-argument is directed it is often desirable that it should

[9] [1949] 2 K.B. 368, 371, and see M.L.R. (1950), Vol. 13, No. 4, p. 417.
[10] [1947] 1 K.B. 659, 664 and [1947] 1 All E.R. 830, 833.
[11] [1892] 1 Q.B. 555.
[12] My italics.
[13] *Ubi supra*, note 4.

take place before a full court'. The learned Lord Chief Justice did not enlarge upon the reasons why re-argument should be desirable before a full court which has no greater powers than any of its divisions.

From this judgment, however, it would seem that the Divisional Court may not consider itself bound by a decision in a case which has not been argued on both sides, and this appears to be borne out by the *All England Reports* (followed in *Current Law*) of the judgment in *Nicholas* v. *Penny* [14] in which the Lord Chief Justice is quoted as saying: 'We can, however, always differ from a case on the ground that it has not been argued on both sides'. Again there is a discrepancy in the reports and the *Law Reports* [15] give the judgment as reading: 'That' (previous) 'case is not a very satisfactory one because the prosecution was not represented on appeal, and a case which has not been argued on both sides has nothing like the weight of authority of one which has been fully argued. But *without necessarily saying that we can always differ* [16] from a previous decision of the Divisional Court merely because it has not been argued on both sides, the court is not obliged to follow that decision . . .' (because the previous decision had been made *per incuriam*, material cases not having been brought to the court's attention).

The ruling that a decision in a case argued only on one side has nothing like the weight of authority of one that has been fully argued seems to indicate a wide gulf between the authority of such a case and one fully argued, but the practical effect is said to be that the court will not 'necessarily' be able to differ from the finding in the previous case, at least not always and not merely because the previous case was argued only on one side. The precise limit of these various provisions is obscure, and the resulting measure of uncertainty quite considerable.

In *Carr* v. *Mercantile Produce Co., Ltd.*,[17] the Lord Chief Justice, speaking in the Divisional Court, further laid down that: 'Where it is a case of the true construction of a section and of what in relation to a particular section it is necessary to prove to show a breach of the factory owner's obligations, a judgment of the Court of Appeal is just as binding on this court, though we may be considering a criminal prosecution, as though we were trying a civil action. To hold otherwise would be to make a serious inroad on the rule of *stare decisis* on which so much of English jurisprudence depends'. This seems contrary to the decision in *R.* v. *Taylor* [18] in the Court of Criminal Appeal. Can it be that the liberty of

[14] [1950] 2 All E.R. 89, 91.
[15] *Ubi supra*, note 2.
[16] My italics.
[17] [1949] 2 K.B. 601.
[18] *Ubi supra*, note 9.

those tried on indictment is more tenderly regarded by the law than that of those tried summarily?

In *Zeidman* v. *Owen*,[19] moreover, where the Divisional Court was confronted with its own previous construction of section 3 of the Betting and Lotteries Act, 1934, and a subsequent inconsistent dictum in the Court of Appeal, Lord Goddard concluded: 'The Court of Appeal in that case was considering section 26 of the Act and not section 3, so Lord Greene's observations were *obiter*, and it is not suggested that they are binding on this court, though, naturally, we should pay great attention to what the learned Master of the Rolls said and, if we thought that the *dicta*, though *obiter*, expressed the true construction of the Act, we should feel we ought to follow them'. From this it seems that the Divisional Court will not necessarily be bound by its own decisions if these are contrary to subsequent *dicta* in the Court of Appeal. While deploring the overspill of binding precedent from the civil to the criminal courts, such a decision should perhaps on balance be welcomed; amid the increasing restriction of previous decisions, the persuasive dicta of a higher court may cast a ray of hope for reconsideration of the stale or unsatisfactory ruling.

On the other hand, in *R.* v. *Northumberland Compensation Appeal Tribunal*[20] there appears to be a further tightening of the principle in *Carr* v. *Mercantile Produce Co., Ltd.*,[21] since the Divisional Court held in that case that, but for the fact that a decision of the House of Lords and one of the Judicial Committee of the Privy Council had not been cited to the Court of Appeal in the case of *Racecourse Betting Control Board* v. *Secretary of State for Air*[22] the Divisional Court would have been bound by the Court of Appeal's decision in that case that the grant of *certiorari* would not lie except on defect of jurisdiction in the inferior court, and Lord Goddard said[23]: 'Decisions of the House of Lords are binding on this court, as are decisions of the Court of Appeal, and if we find that a decision of the Court of Appeal is inconsistent with a decision of the House of Lords, applying the principles which run through the decision in *Young* v. *Bristol Aeroplane Co., Ltd.*,[24] we are bound to follow the decision of the House of Lords'. So the ruling that the Divisional Court is bound by a previous decision in the Court of Appeal 'where it is a case of the true construction of a section and of what in relation to a particular section it is necessary to prove or show a breach of the factory owner's obligations' has in a few months become a ruling that the Divisional Court is bound by a previous decision of the Court of Appeal *simpliciter*. Thus

19 [1950] 1 K.B. 593; 1 All E.R. 290, 291.
20 [1951] 1 All E.R. 268, 274.
21 *Ubi supra*, note 17.
22 [1944] Ch. 114.
23 At p. 277.
24 *Ubi supra*, note 5.

rapidly is the rigour and extent of *stare decisis* increasing. True, the question at issue in *R.* v. *Northumberland Compensation Appeal Tribunal* [25] is a procedural one, having no direct relation to penal consequences, but no such distinction was adverted to in the judgment and the rule that ' decisions of the House of Lords are binding on this court, as are decisions of the Court of Appeal ' was stated in the most general terms.

The principle that superior courts of jurisdiction are bound by their own previous decisions is of comparatively recent origin. In the House of Lords it was finally laid down only in 1898 [26]; it was first applied in the Court of Appeal in *Young* v. *Bristol Aeroplane Co.*[27] in 1944, and in the Divisional Court in 1947.[28] It is curious that such a doctrine based on the paramount importance of certainty in law as opposed to growth or change, should have been enunciated at a time of widespread economic and social change, when Parliamentary time is more fully occupied than at any previous period and the possibilities of Parliamentary revision of judicial decisions correspondingly lessened. Is such a doctrine, imposed at such a time, indeed conducive to the most efficient administration of justice? Moreover, when the legislature of what has fairly suddenly become a partially controlled economy is constantly adding to the number of statutory offences triable summarily, is it desirable that the final court of appeal for such offences should bind itself for all time not only by the findings of its predecessors, but also by those of a superior court, such as the Court of Appeal, which is expressly excluded by Statute from jurisdiction in any criminal cause or matter? Such questions as these must sometimes trouble the mind of the practising lawyer, driven by an increasingly restrictive doctrine into the more rarified forms of distinguishing in an attempt to circumvent the undesirable effects of the new rule.

O. M. Stone.

[Since the above note went to press the report of *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex p. Zerek*, has been received ([1951] 1 All E.R. 482). The above conclusions are not, however, affected by this decision in which the Divisional Court merely took a restrictive view of its previous decision in *R.* v. *Hackney, Islington and Stoke Newington Rent Tribunal, Ex p. Keats* ([1950] 2 All E.R. 138). There is, of course, ample authority for a later court to hold that while an earlier decision is binding upon it, the *ratio decidendi* of that decision was too widely expressed.]

[25] *Ubi supra*, note 20.
[26] *London Street Tramways* v. *London County Council* [1898] A.C. 375.
[27] *Ubi supra*, note 5.
[28] *Ubi supra*, note 1.

The Standard of Proof of Adultery and Cruelty in Divorce Proceedings

In a recent note in 13 M.L.R. 506, Mr. D. C. Potter maintains that 'As a result of recent decisions in the Court of Appeal the rule laid down in *Ginesi* v. *Ginesi* [1948] P. 179, that the standard of proof in adultery is the same as in criminal cases, has been rejected, and can no longer be regarded as reliable'. It is submitted, however, that the matter is not so simple; that the authorities in the Court of Appeal on this matter are in some confusion; and that they require somewhat closer examination.

In the first place it must be noted that *Ginesi* v. *Ginesi* has not yet been overruled. True, in *Gower* v. *Gower* (1950) 66 T.L.R. (Pt. 1) 717, Denning L.J. said that the Court of Appeal might be entitled to reconsider *Ginesi* v. *Ginesi* if and when the occasion arose, but this does not amount to overruling, and no such occasion has yet arisen.

The next case bearing on the controversy is *Davis* v. *Davis* [1950] P. 125, where the issue involved was not adultery but cruelty. Denning L.J. in this case seized upon the observations of the court in *Ginesi* v. *Ginesi* that that decision applied only to adultery cases. He went on to argue that the standard of proof differs in criminal and civil proceedings; that divorce was a civil proceeding: *Mordaunt* v. *Moncreiffe* (1874) L.R. 2 Sc. & Div. 374, and that therefore the civil rules as to standard of proof should apply in divorce cases. In Denning L.J.'s opinion the Matrimonial Causes Act, 1937, s. 4, now re-enacted in the Matrimonial Causes Act, 1950, s. 4, did not impose any extraordinary burden in requiring the court to be 'satisfied' of adultery, etc., before pronouncing a decree. Bucknill L.J., on the other hand, was of opinion that a decree should not be granted 'if there is any reasonable doubt at the end of the case' (at p. 127). He in this case formulated the standard as follows: 'The word "strict" is quite sufficiently apt to indicate the measure of standard of proof in the case of cruelty . . . it is unnecessary to bring the question of criminal charges into consideration'. On the facts of *Davis* v. *Davis* both the learned Lords Justices reached the same conclusion.

In *Gower* v. *Gower* [1950] 1 All E.R. 804; 66 T.L.R. (Pt. 1) 717, the problem of the standard of proof in adultery was again raised. Bucknill L.J., though apparently not satisfied with the argument from the quasi-criminal nature of adultery, nevertheless appears to apply the criminal standard in this case: 'In a civil action a matter may be proved on a balance of probabilities . . . while on the other hand in a criminal case the matter must be proved beyond reasonable doubt. . . . The evidence must be such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused. If the accused gives any reasonable explanation which is consistent with his innocence, the matter is not proved beyond a reasonable

doubt. I apply that test here . . .' (at p. 805 of the All E.R.). Denning L.J., on the other hand, said: 'I do not think that this court is irrevocably committed to the view that the proof of a charge of adultery must be as high as in a criminal charge' (at p. 718 of the T.L.R.). On the face of it *Ginesi* v. *Ginesi* is flatly against this proposition. Denning L.J. presents five arguments against the authority of that case, as a result of which he claims that the case is open to reconsideration by the Court of Appeal under the rules in *Young* v. *Bristol Aeroplane Co., Ltd.* [1944] K.B. 718.

(1) That the matter was not fully argued. But obviously the attention of the court was focused on the point.

(2) That *Mordaunt* v. *Moncreiffe* was not cited to the court. This decision of the House of Lords 'strikes at the root' of the decision of the Court of Appeal. But can it be said that *Mordaunt* v. *Moncreiffe* is inconsistent with *Ginesi* v. *Ginesi* within the meaning of *Young's Case*? True, the former case decided that divorce was a civil proceeding, but it decided nothing as to the standard of proof, which is the subject of the decision in *Ginesi* v. *Ginesi*.

(3) That there was no mention in *Ginesi* v. *Ginesi* of the Matrimonial Causes Act, 1937, which simply requires the court to be 'satisfied' that the case for the petition has been proved. But the words of the statute are quite ambiguous and lay down no clear rule as to standard of proof.

(4) That the High Court of Australia has not followed *Ginesi* v. *Ginesi*. This is a mere persuasive argument and has nothing to do with the possibility of the Court of Appeal reconsidering its own previous decision.

(5) That in *Davis* v. *Davis* the criminal standard was held not to apply and that 'so far as the statute is concerned no valid distinction can be drawn between the standard of proof in cruelty and adultery'. This is the most remarkable argument of all. In the first place it must be reiterated that Bucknill L.J. in *Davis* v. *Davis* did require proof beyond a reasonable doubt, which, it will be submitted, is the same as the standard in criminal cases. More seriously—this argument, in so far as it tries to prove that the question is open to reconsideration by the Court of Appeal under the rule in *Young's Case*, is inconsistent with Denning L.J.'s ratio in *Davis* v. *Davis*. In that case, he maintains that *Ginesi* v. *Ginesi* cannot apply to cruelty cases because it is restricted to adultery cases. In *Gower* v. *Gower* on the other hand he maintains that the decision in *Davis* v. *Davis* applies to adultery because there is no difference in principle between adultery and cruelty cases. In maintaining this, Denning L.J. must surely admit that he was wrong in *Davis* v. *Davis*: if there is no such difference he was bound in *Davis* v. *Davis* by *Ginesi* v. *Ginesi* and ought not to have decided for the reasons he gave. If he is then driven back onto the distinction between adultery and cruelty, he was wrong in *Gower* v. *Gower*. With respect, the learned Lord Justice cannot have it both ways.

The most recent case on this matter is *Bater* v. *Bater* (1950) 66 T.L.R. (Pt. 2) 589. In this—a cruelty case—both Bucknill and Somervell L.JJ. require proof beyond a reasonable doubt, Bucknill L.J. making the point that the court cannot be 'satisfied' within the Matrimonial Causes Act 'if at the end of the case the court has reasonable doubt in its mind whether the case has been proved'. One is somewhat surprised that Denning L.J. in this case agrees with his brethren, in view of the fact that the standard applied by Bucknill and Somervell L.JJ. was manifestly a different one from that which he himself had applied in *Davis* v. *Davis*. He argues in this case that the dispute is merely a verbal one. He then proceeds to draw a distinction between the civil and the criminal standard, and says that within each standard there are different degrees depending on the subject matter and the conclusion to which the court is required to come. A reasonable doubt is 'merely that degree of doubt which would prevent a reasonable and just man from coming to the conclusion. So the phrase "reasonable doubt" takes the matter no further' (at p. 592). It does not tell us whether the degree of persuasion required is 51 per cent. or 99 per cent. This, with respect, is beside the point. Even if the test did tell us this, it would be of no use as no one can accurately measure degrees of human persuasion. The phrase 'proof beyond a reasonable doubt' makes no pretence to such mathematical precision. Denning L.J. finally argues that the criterion of reasonable doubt applies to criminal, civil, and divorce cases alike. 'The only difference is that . . . a doubt may be regarded as reasonable in the criminal courts which would not be so in the civil courts' (at p. 592). Thus Denning L.J. distinguishes between 'proof beyond a reasonable doubt' and the standard required in criminal cases. Such a distinction would appear to be a novel one in our law. It sounds particularly strange in the mouth of a judge who in *Miller* v. *Ministry of Pensions* (1947) 63 T.L.R. 474, regarded the 'degree of cogency . . . required in a criminal case' as 'well settled' and said that it 'need not reach certainty but must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of a doubt' and who contrasted this degree with the 'degree of cogency . . . required in civil cases' which he also regarded as 'well settled' and which he defined as follows: 'It must carry a reasonable degree of probability but not so high as is required in criminal cases' (at p. 474). Denning J. (as he then was) here clearly treats the 'degree of cogency required in a criminal case' and 'proof beyond a reasonable doubt' as synonymous, and it is submitted that this is the established legal usage. To argue that whenever a fact-finder finds for a party he does so because he is left in a reasonable doubt as to the other party's case is in a sense true, but such an argument disregards the established legal meaning of

the term 'proof beyond a reasonable doubt'. It is merely to confuse the distinctions so well and clearly drawn in *Miller's Case*. It is submitted that the decision in *Ginesi* v. *Ginesi* cannot be reopened by such means.

Mr. Potter in the note mentioned above argues that proof beyond a reasonable doubt is not necessarily the same as the criminal standard. He argues:

(1) That the words 'reasonable doubt' are flexible and do not impose any absolute standard: thus on a serious charge doubt is less easily dispelled than on a trivial one. This may well be true, but it would apply equally to a distinction between the standards required in serious and less serious *criminal* charges. Even if the standard in larceny is lower than the standard in murder, it is still the criminal standard, and it is still proof beyond a reasonable doubt.

(2) That certain rules of evidence—*e.g.*, relating to the admissibility of confessions and to the requirement of corroboration—differ in divorce and criminal proceedings. This consideration, however, has nothing to do with standard of proof. Further, Mr. Potter's second example here might be regarded as unfortunate in view of the decision in *Fairman* v. *Fairman* [1949] P. 341.

It remains to consider whether the decision of the House of Lords in *Preston-Jones* v. *Preston-Jones* [1951] 1 T.L.R. 8 has definitely established the criminal standard for proof of adultery in divorce proceedings. The question before the House was whether it was sufficient proof of adultery if the petitioner showed that his last opportunity of access to the respondent was 360 days before birth of a child to the respondent and also called *some* medical evidence to show that that interval was too long for him to be the father of the child. (The case deals at length and, it is submitted, somewhat inconclusively with a question of judicial notice which is beside the point of this note.) At first sight it looks as if this is the effect of the decision, for their Lordships are unanimous in requiring proof beyond a reasonable doubt. Lord MacDermott indeed, at p. 23, rejects the analogy of the criminal law, but nevertheless contemplates a standard as strict as the criminal standard although based on different grounds.

As to the precise effect of the decision, however, the following observations may be made:

(1) It was not disputed by the petitioner that he must give proof beyond a reasonable doubt. The respondent contended that the petitioner must give proof establishing a scientific certainty. All that was actually laid down in the case was that the standard is not *higher* than proof beyond a reasonable doubt. Strictly, therefore, the decision does not conclude the argument whether the standard may not be lower.

(2) On the facts of the case a finding of adultery would have involved a finding that the child of the respondent was illegitimate. Therefore, in addition to satisfying the normal burden the petitioner had to discharge the presumption of legitimacy, which is one of peculiar strength. (See the well-known judgment of Lord Lyndhurst in *Morris* v. *Davies* (1837) 5 Cl. & F. 163.) It is clear that this consideration seriously influenced their Lordships' judgments in this case. Thus Lord Simonds said : ' The result of a finding of adultery in a case such as this is in effect to bastardise the child. *That* is a matter in which from time out of mind strict proof has been required ' (at p. 11). Similarly Lord Oaksey said : ' The decision involves not only the wife's chastity but in effect the legitimacy of the child ' (at p. 18). Lord Oaksey agreed in principle with the majority and dissented only because he thought that the evidence was not sufficient to establish the petitioner's case beyond reasonable doubt: ' To hold that such evidence discharges the onus which rests on the prosecution in criminal cases or on any party *who seeks to prove illegitimacy* is . . . to depart altogether from the practice of such cases ' (at p. 19). Similarly Lord MacDermott stresses the fact that the issue in this case involved the legitimacy of the child (at p. 22). It may well be, therefore, that where proof of adultery involves bastardising the respondent's child the presumption of legitimacy has the effect of imposing an unusually heavy burden on the petitioner.

Assuming that *Preston-Jones* v. *Preston-Jones* still leaves it open to the House of Lords to apply a less strict standard to divorce proceedings, the crucial question is whether it would be desirable for the House to do so. As to this the following considerations would appear to be relevant:

(1) The word ' satisfied ' in the Matrimonial Causes Act, 1950, s. 4, gives no definite guidance in this matter. Taken alone this word does not make it clear whether the court must be satisfied beyond a reasonable doubt or on a balance of probabilities. Lord MacDermott in *Preston-Jones* v. *Preston-Jones* at p. 23 and Bucknill L.J. in *Bater* v. *Bater* express the view that the Act requires proof beyond a reasonable doubt; Denning L.J. in *Davis* v. *Davis* that it requires only the normal civil standard. The latter would appear, with respect, to be the better view. The Act requires the court to be ' satisfied ' not only of the fact that there has been adultery, cruelty, etc. (section 4 (2) (*a*)) but also of the fact that there has been *no* connivance, condonation or collusion (section 4 (2) (*b*) and (*c*)). It can hardly be maintained that the petitioner must disprove connivance, condonation and collusion beyond a reasonable doubt. Yet the word ' satisfied ' in subsection (2) governs paras. (*b*) and (*c*) of the subsection as well as para. (*a*) and there is nothing to indicate that the word does not bear the same meaning in relation to each of these paragraphs. On the whole, therefore, the wording of the Act seems to support the view

that the appropriate standard of proof in divorce proceedings is the ' civil ' standard.

(2) It is anomalous that different standards should prevail for proof of adultery and cruelty, yet if we accept Denning L.J.'s ratio in *Davis* v. *Davis* that is the position of the Court of Appeal authorities. Tucker L.J. in *Ginesi* v. *Ginesi* limited his proposition to cases of adultery because of the quasi-criminal nature of adultery in the Ecclesiastical courts. Does this furnish a valid test for distinguishing cruelty from adultery? It is submitted that it does not. In the first place cruelty as well as adultery may frequently be of a quasi-criminal, if not of an actually criminal nature. Secondly, it is submitted that by now the views of the Ecclesiastical courts—whose jurisdiction in this matter was abolished nearly 100 years ago—might conveniently be disregarded.

(3) The remaining consideration is—what standard of proof should be required as a matter of policy? The rule as to standard of proof in criminal cases is based on the desire to protect the accused and to give him every possible benefit (see 65 L.Q.R. 220). In divorce proceedings the same considerations do not apply. If an exceptionally high standard of proof is to prevail it must be based on independent considerations. Thus it has been suggested that a higher standard is required on account of the Divorce Court's ' peculiar duty of protecting the sanctity of marriage ' (see 65 L.Q.R. 220). But it is difficult to see why this duty is more ' peculiar ' than the duty of the courts in protecting life, reputation and property in actions in tort. On this point it is respectfully submitted that Denning L.J.'s argument in *Davis* v. *Davis* (at p. 129)—that a strict standard may unjustly deprive an injured party of a remedy in divorce proceedings—is sound from the point of view of policy.

In conclusion, it is submitted that to justify an exceptional standard of proof exceedingly strong policy reasons are required and that these have not been made out for divorce proceedings, at any rate, so far as those which do not involve legitimacy are concerned. While on the present Court of Appeal authorities such an exceptional standard does appear to be established, it is submitted that the decision in *Preston-Jones* v. *Preston-Jones* has not concluded the question, and that if it were to come up in a neat form in the House of Lords the opinion of Denning L.J. in *Davis* v. *Davis* ought to be followed.

G. H. Treitel.

REVIEWS

THE INHERITANCE OF THE COMMON LAW. By RICHARD O'SULLIVAN, K.C. THE HAMLYN LECTURES: Second Series. [London: Stevens & Sons, Ltd. 1950. viii and 118 pp. 8s. net.]

THE HAMLYN TRUST is unique in the law. Other branches of knowledge have had trusts for their furtherance. Most people have heard of the Giffard, Rede and Romanes lectures for other subjects but there were no comparable lectures for the law until Miss Hamlyn left her estate for the purpose.

In this series of lectures Mr. Richard O'Sullivan, K.C., has traced the origin of some of the most fundamental conceptions of the law. He has shown how much we owe to the Christian religion. We owe the concept of the 'reasonable man' to the Christian sense of equality of human nature: the indissolubility of marriage to the Church regarding it at one time a sacrament: our political freedom to the Christian view of the relations between Church and State: and our freedom of conscience to the law of nature as transformed in the light of the Christian revelation. The reason is because the Christian religion has been the religion of the judges and of the people of England, both before and after the Reformation. It is not because the English common lawyers had any love for the canon and civil law. They would never have anything to do with the positive doctrines of the canonists and theologians. Mr. O'Sullivan gives interesting examples of their refusal to accept the Papal decretals—*Nolumus leges Angliæ mutare*. He does not stop at the Reformation. He traces the concepts down to the present day and warns us of the dangers of our times. But he is not a pessimist. 'The ordinary man of the law who is the despair of the gentleman in Whitehall may yet be the hope of the world.'

Mr. O'Sullivan's hero is Sir Thomas More whom he describes on three occasions as 'the most illustrious of the common lawyers'. This is the only point at which some may disagree with him. Whatever claims to fame that More may have, they do not rest on his contributions to the common law: for he made none of any permanent value. His only judicial office was his two and a half years as Lord Chancellor when, in the exercise of his equitable jurisdiction, he issued injunctions restraining proceedings at common law. But he did not himself exercise any common law jurisdiction: and he wrote no legal work. There are many names in the common law far more illustrious than that of More. For instance the character of Sir Matthew Hale was as exemplary as that of More, and he contributed far more to the common law.

That, however, is a small point. The lectures of Mr. O'Sullivan are a notable contribution to our legal history. They are illumined by his wide reading and learning and are full of the good common sense which marks the good common lawyer that he is. It is a book well worth reading and keeping.

A. T. DENNING.

CONSTITUTIONAL LAW. By E. C. S. WADE, M.A., LL.D., and G. GODFREY PHILLIPS, C.B.E., M.A., LL.M. Fourth Edition by E. C. S. WADE. [London: Longman's, Green & Co. 1950. xxix and 535 pp. 35s.]

CONSTITUTIONAL LAW. By E. W. RIDGES. Eighth Edition by G. A. FORREST, M.A. [London: Stevens & Sons, Ltd. 1950. xxviii and 550 pp. 42s.]

The previous edition of *Wade and Phillips* appeared in 1946, and the previous edition of *Ridges* (sub nom. *Keith*) as long ago as 1939. The duties of their editors have therefore been heavy. Although the fundamental continuity of constitutional development has been preserved, new trends that are certain to have lasting significance have emerged, particularly in administrative and local government law and in Commonwealth affairs. Moreover, statutes like the Representation of the People Acts, the Crown Proceedings Act, 1947, and the British Nationality Act, 1948, have so altered the old law that substantial portions of the texts have had to be rewritten.

Wade and Phillips is essentially a students' textbook; and a remarkably good textbook it is. Hitherto it has been distinguished by balance, conciseness and accuracy rather than by readability, but the present edition is more interesting than any of its predecessors. It includes a good new chapter on Cabinet organisation, and the first few pages of the section on administrative law have been greatly improved. These and other changes have made the book more than a textbook of the law of the constitution; it is a succinct account of constitutional practice as well as of constitutional law, of public administration as well as of administrative law.

Errors and omissions are very few. Returning officers at elections are no longer under any civil liability (p. 79) nor are they disqualified from voting (p. 80): see Representation of the People Act, 1949, ss. 50, 17 (6). (The same errors occur in *Ridges*, pp. 49, 48.) The effect of the Triennial Act, 1694, is misstated (p. 87). In the present Parliament the Deputy-Chairman of Ways and Means is a member of the Opposition (p. 91). Not all special juries were abolished by the Juries Act, 1949 (p. 223). The Crown cannot be sued in England in respect of breaches of contract by colonial governments (p. 404). The membership of the Canadian Senate was increased upon the incorporation of Newfoundland in 1949 (p. 418). Occasionally the treatment of individual topics is too compressed to be adequate. Thus, the conventions governing the exercise of the prerogative of dissolution are at once more complicated and less vague than the text would suggest: see, *e.g.*, Eugene Forsey, *Royal Power of Dissolution of Parliament in the British Commonwealth*. The closure in the House of Commons is not clearly explained (p. 104), and few students will understand the *Bradlaugh Cases* from the account given at pp. 119–20. It would have been useful to have a more detailed statement of the procedures by which Parliament supervises the affairs of nationalised industries. Something might well have been said of the colonial application clause in modern British treaties: see 1949 B.Y.I.L. 86. These criticisms and suggestions are all concerned with small points. Probably no one but the learned editor could have written so comprehensive and accurate a book in so few pages.

Ridges is a book of a different character. Inelegantly written, particularly in the important introductory chapters, it has nevertheless been an invaluable work of reference. It is well documented, and contains a wealth of information on many recondite topics. The last three editions, by Professor Berriedale Keith, bore the impression not merely of the editor's remarkable scholarship but also of his less noteworthy views on current political developments. His successor must have faced an extremely difficult task. He has improved the lay-out and balance of the book, notably by omitting the chapters on the history of legal institutions and most references to internal affairs in Commonwealth countries, and by rearranging and shortening the account of local government. He has also added new chapters on administrative law, delegated legislation, judicial control of public authorities and Crown proceedings; these chapters are sound, if rather brief. In the result, *Ridges* has become less overweighted with historical learning and Commonwealth affairs, and is accordingly less likely to daunt the uninitiated.

Unfortunately, however, the present edition suffers from a serious defect. The work of re-editing began as early as 1947, and apparently it was not

found possible to rewrite some out-of-date passages before the book finally went to press. It is disconcerting to find, in a book published late in 1950, that 'the present Session' refers to the year 1947 (p. 101). Presumably the date of editing the text explains the failure to give a realistic picture of the work of the post-war Estimates Committee (p. 118) or to mention that a political test is applied to civil servants. The composition of the Economic Advisory Council (which ceased to function in 1939) is described, but not the present organisation for central economic planning. The terms of reference ascribed to the Select Committee on Statutory Instruments (p. 283) exclude two that had been added by the end of 1948. All relevant statutes appear to have been mentioned (though at p. 479 the British Settlements Act, 1887, is summarised without mention of the amendment made by the Act of 1945), but important cases reported in the last three years are often omitted *e.g.*, the court-martial cases, *Robertson* v. *Minister of Pensions*, *Tamlin* v. *Hannaford*, *Franklin* v. *Minister of Town and Country Planning*. In some places the new law has been noted without the necessary amendments to the outdated text: *e.g.*, at pp. 106–7, the law is stated as it stood before the enactment of the Parliament Act, 1949, in spite of the fact that the enactment and purport of the 1949 Act are recorded immediately after; at p. 183 it is correctly stated that the Lord Chancellor now advises on the appointment of recorders (Justices of the Peace Act, 1949), but the old law is given at pp. 325 and 336. These are not isolated instances, and the effect must inevitably be to confuse the student and disappoint those who regard *Ridges* as the best modern work of reference on constitutional law. No doubt the difficulties encountered with the present edition are unlikely to recur, but they detract from its otherwise considerable merits.

S. A. de Smith.

Archbold's Criminal Pleading, Evidence and Practice. Thirty-second Edition by T. R. Fitzwalter Butler and Marston Garsia. [London : Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. 1949. cxxviii and 1650 pp. (with index). With Third Cumulative Supplement dated September 1, 1950, £4 4s.]

Harris and Wilshere's Criminal Law. Eighteenth Edition by A. M. Wilshere. [London : Sweet & Maxwell, Ltd. 1950. xlix and 692 pp. (with index). £1 10s.]

The new edition of *Archbold* has been prepared within the limits of the practitioner's tradition of editing, which is to note the latest cases and statutes at what appear to be the most appropriate places in the traditional text. If one is left dissatisfied with the result, it is largely because this method of editing performed thirty-one times since 1822 produces a volume that is out of touch with modern thinking about criminal law.

The most striking deficiency is in an exposition of general principles. All the great institutional writers have dealt with these general principles, but the treatment of them in *Archbold* is meagre and misleading. For instance, there is no general discussion of the defence of necessity or of superior orders. At p. 12, mens rea is required for every crime; the qualification does not come till p. 22, and then there is no adequate discussion. On p. 5 it is said that in treason mere intention is indictable, and also that an attempt occurs wherever a criminal intention is manifested by overt act; the qualifications upon these propositions appear much later in the book. In support of the generalisation that 'an indictment will not lie for a mere private injury' (p. 9), examples are given that are misleading because they take no account of statutory crimes; it should be made clear that the passage is concerned only with the common law. The statement on p. 11 that a limited company

can as a general rule be indicted for the criminal acts of its human agent is too wide; it should be limited to the acts of those in control of the company. A half-hearted effort is made to state some rules of construction of penal statutes, but there are plenty of omissions; for example, there is no discussion of the principle of strict construction or of the presumption against retroactivity. References to *Maxwell on Interpretation* should take account of the fact that a new edition appeared in 1946.

An extract from section 38 (2) of the Interpretation Act is wrongly headed 'Effect of repeal on *pending* proceedings' (p. 10), and it concludes with the following sentence: 'For an instance of a prosecution under an Act and regulation which had expired in respect of offences committed during the currency of the Act and regulation, see *Wicks* v. *D. P. P.* [1947] A.C. 362'. Now expiry is not the same as repeal, and therefore falls neither within the heading of the paragraph nor within the Interpretation Act. The citation of *Wicks* is misleading because there the expired statute expressly provided that past offences should continue to be punishable after the expiry. But for this, it appears from the decision that the statute would have ceased to apply. The legal position disclosed by the case seems to be a curious one, for it means that as a general rule a man can commit an offence against a statute an hour before it is due to expire with impunity. What is needed is an amendment to the Interpretation Act to deal with the situation, and in the meantime the text of *Archbold* should be amended to draw attention to the point.

There is no connected account of the powers of the police and other persons in relation to the prevention of crime and the apprehension of offenders. A few principles relating to arrest on warrant are stated on pp. 65–70, but some important rules are left out, *e.g.*, that in *Hughes* (1879) 4 Q.B.D. 614. Perhaps we are intended to look for the law of justices' warrants in *Stone*, but *Archbold* does not candidly announce its own limitations. Arrest otherwise than under warrant is dealt with only under the crime of false imprisonment, and pretty inadequately there. For example, there is no reference to *Barnard* v. *Gorman* [1941] A.C. 378, on the construction of statutes that empower arrest. (Incidentally, the title 'arrest' in the index refers to a title 'Emergency Legislation', but the latter title is not to be found, and in fact there is a notable absence of the so-called emergency legislation from the book.) There is no discussion of the power of the police to search persons arrested, or to have them medically examined; nothing about *Elias* v. *Pasmore* [1934] 2 K.B. 164, save in incidental references; nothing (though this is perhaps more understandable, in view of its connection with courts of summary jurisdiction) about the right of the police to take finger prints.

Although most of the discussion of arrest is postponed to p. 1037, bail comes already at p. 71. The question whether the justices' discretion as to bail is impliedly generalised by the Costs in Criminal Cases Act is most obscurely propounded on pp. 73–4, and there is no reference to the question whether a High Court Judge is compellable to grant bail for misdemeanour on writ of habeas corpus (Stephen, *H.C.L.* i 243). Nor is there mention of bail by the police. The reference at the foot of p. 73 should be to s. 32 of the Children and Young Persons Act, not to section 13 (2), though section 13 (2) should be referred to with a different introductory sentence. (In the previous edition the reference was, quite wrongly, to section 2; it is somewhat odd that when the editors noticed the misprint they still did not get the section right.)

On p. 144 it is stated that there is only one instance where a special plea in bar is needed in practice, with the exception of the pleas of *autrefois acquit* and *convict* and pardon. This seems to imply that the pleas of *autrefois acquit* and *convict* are needed. On p. 151 it is explained that where the accused has pleaded Not Guilty and wishes to plead *autrefois acquit* or *convict*, the court would, it seems, allow the plea of Not Guilty to be withdrawn

for the purpose of pleading the special plea (quoting *Banks* [1911] 2 K.B. 1095). Both these statements are misleading, because now the court takes the view that the accused is entitled to be acquitted on a successful defence of *autrefois acquit* or *convict* even under the general issue: see *Thomas* [1949] 2 All E.R. 662, a case which is not noted on this point in the First, Second or Third Supplements.

There was a time when the editors of *Archbold* made an attempt to incorporate references to Dominion law. Such as have been put in, stay, but they are not properly kept up to date. Thus, at p. 1337 *Macleod's Case* is cited without reference to the Statute of Westminster, though this reference is given at p. 26. The British Nationality Act, 1948, is noted at p. 223, but section 3 dealing with extraterritorial offences is not mentioned at pp. 26 ff.

The discussion of bigamy is silent on the question whether a marriage under a system of law that recognises polygamy is a valid marriage for the purpose of grounding a charge of bigamy The discussion of blackmail is poor, and in particular the statement on p. 668 that the belief of the prisoner in reasonable and probable cause affords no defence is misleading as it stands. On p. 197 it should be made clear that, at common law, on an indictment for felony there can be no conviction for a misdemeanour even though the definition of the latter is wholly comprised within that of the felony, and *Stokes* (1925) 19 C.A.R. 71 should be cited. There seems to be no statement of the important rule that the accused cannot waive the rules of procedure: *Bertrand* L.R. 1 P.C. 520 is cited, but not for this point.

The treatment on pp. 910–11 of the question whether a killing in the course of an unlawful act is necessarily manslaughter is unhappy. It is first said that such a killing is 'generally speaking' manslaughter, and various illustrations are given, ending with Foster's illustration of killing a bystander when unlawfully shooting at another's poultry; but quotations are then given in which this is doubted. No reference is made at this place to *Franklin* or (except by a cross-reference which does not bear on the point) to *Andrews*, both of which cases are thought to be against the proposition favoured in the text. They are mentioned at p. 913 without their importance being brought out. On this page it is stated, correctly, that criminal negligence is something grosser than negligence in tort; yet if the accused has killed another by tortious negligence, that is a killing by an unlawful (*scil.* tortious) act, and, consequently, on the theory in the book, is manslaughter; hence on this theory there can be no difference between criminal and civil negligence.

The passage just cited is typical of the antiquarian flavour which results from insufficiently courageous editing. Another illustration of this is the wonderful 'poison' passage on p. 896. This passage has become obsolete now that it is recognised that the phrase 'malice aforethought' has a technical meaning which does not need to be supported by a doctrine of constructive enmity.

If there is any obscurity in the present law, it may safely be assumed that *Archbold* will not lighten it. Also, the possibility of a decision being overruled never presents itself to the editors, even where the decision is plainly open to criticism. This is so, for example, with *Treanor*, the reasoning in which was so defective that it was overruled by a unanimous court of seven judges after the work appeared. All that *Archbold* does is to give the gist of the decision without query and without reference to the reasons for it. It follows that a practitioner who relies only on *Archbold* is liable to be grievously misled; he will find doubtful decisions put on the same level as those that are universally approved.

The usual protest may be entered against the absence of references to modern legal literature. The same indictment lies against the other books used by the practising criminal lawyer, *Russell*, *Halsbury*, and *Stone* (except that the latter refers to the Justice of the Peace Journal); also against *Harris and Wilshere*. If it is too much to expect the editors of these works to keep their eye on the two legal quarterlies in the country, could they not

at any rate take cognisance of such a collection of essays as that published under the title of *The Modern Approach to Criminal Law*? In the law of tort, academic writings are beginning to be made use of by the judges; that is probably because the works by Salmond and Winfield on Tort are used by practitioners, and these works refer to periodical and other literature. So far the criminal courts have seemingly remained in complete ignorance of law-review discussions, and they will continue to do so until a change of policy takes place in the practitioners' books.

Lest it be thought that the adoption of this suggestion would add to the length of the book, it may be pointed out that here is a good deal of prolixity, the elimination of which would save more space than would be taken by references to literature. For example, on p. 1038 the rule that a constable may arrest on reasonable suspicion of felony is expressed three times in different formulas, with different authorities for each. The rule in *Sharrock* and other cases (that if one of several persons jointly charged is called to give evidence for the prosecution at the preliminary hearing the indictment must be quashed) is set out repetitiously at pp. 3–4, 463, 466, yet is not mentioned at pp. 84–7 on the quashing of indictments, and is not indexed under Accomplice. More cross-referencing and less duplication would effect improvement.

In a practitioner's book one would expect to find statements of practice as opposed to law, but there is little of this sort of guidance in *Archbold*. The Law Officers' right of reply is set out in full as though it represented present practice, though according to Kenny (*Outlines*, 15th ed., p. 570, n. 6) a decision was taken in 1930 not to exercise this right henceforth. On p. 1039, there is quoted the statement in ancient textbooks that a private person is under a duty to arrest a person who commits felony in his presence; no warning is given that prosecutions for breach of this supposed duty are unknown. (The law seems to be stated in a much more restricted way on p. 1003, where the discussion is out of place and is not cross-referenced, or indexed under 'Breach of the peace': in fact there is no entry in the index under that heading at all.) It is a quaint understatement to say (p. 4) that impeachment is 'now very rarely resorted to', and (p. 1002) that 'parish constables have for most purposes been superseded by' Peel's police. Also, there is no assistance on some questions of etiquette, like the duty of counsel when the accused has confessed his guilt.

It would be tedious to catalogue the instances where cases that support the statements in the text are omitted to be noticed, and it may be that comprehensiveness is not to be expected (though the *English and Empire Digest* manages to achieve it). There is, however, one question of principle that deserves to be raised. *Archbold* is concerned with indictable offences, not petty offences: but of course it frequently happens that the same principles of law are applicable to both, and in that event a case decided on a petty offence is quotable on an indictable offence and vice versa. One cannot, therefore, believe that it has ever been the policy of the editors of *Archbold* automatically to exclude all reference to decisions on a case stated from magistrates. Yet it is hard sometimes to imagine how a case came to be omitted except on this hypothesis: for instance, the omission of *Davis* v. *Lisle* [1936] 2 K.B. 434 and *Duncan* v. *Jones* [1936] 1 K.B. 218 on p. 1003.

Something has already been said about the arbitrary arrangement of parts of the book. As another illustration, several sections of the O.A.P.A., relating to arrest, accessories, venue, and sureties are set out on pp. 888–9, under the heading of Homicide. The references to the different series of reports are also haphazard; little effort is made to cite all reports, and sometimes even the Law Reports are not cited.

These errors and omissions are merely those that have caught the reviewer's eye when dipping into the book, and the ease with which they are discovered does not give a sense of assurance with the rest of the book.

Archbold is a valuable work; it combines compactness with the giving of a large amount of information, and for its precedents of indictments it is unapproached. The very fact that it is indispensable to the practitioner makes one regret the more that in its statement of principles it is so unenlightening.

Several of the matters that have been mentioned in this review are more the responsibility of previous editors than of the present ones. The truth is that it cannot be expected of two busy practitioners that they should be able to devote the time necessary to give this book the revision it requires. *Archbold* needs the treatment that *Dicey* received—recension that amounts to rewriting: not necessarily by men with great forensic names, but people who are prepared to give much time to the task.

The new edition of *Harris and Wilshere* is to be welcomed, for this is not only a useful statement of particular crimes but the most intelligible account of criminal procedure that we have. The new edition has been prepared with care and accuracy. If any criticism is to be made of the book it is that the discussion of general principles is inadequate. A small point that may be considered for a later edition is that cross-references should be to pages rather than to long sections of chapters. For example, on p. 228 n. (*a*) there is a reference to a section running for 55 pages, though the particular matter is only on one page.

G. L. W.

THE HEARSAY RULE. By R. W. BAKER, Professor of Law in the University of Tasmania. [London: Pitman. 1950. xxi and 180 pp. 30s. net.]

WHEN the Evidence Act, 1938, was passed, it was described as a trial balloon and there seemed to be a good prospect that it might be regarded only as a first step towards a thorough reconsideration of the 'tangled web' of the law of evidence. Nothing has, alas, happened so far to bring this urgently needed reform any nearer, but when eventually the task is taken in hand it will undoubtedly be found that Professor Baker, in this first comprehensive monograph on the hearsay rule, has done much valuable spade-work.

'What the soldier said is not evidence' might appear to represent an ancient precept of the Common Law, but the hearsay rule is in fact a fairly recent creation of judges not firmly established in English courts until the early 19th Century. In so far as it postulates that hearsay testimony is less reliable and trustworthy than a direct report by an eye-witness, the rule corresponds to sound common-sense experience and provides a useful warning against inherently dangerous evidence; it is only over the conclusion drawn from this proposition, namely the a priori non-admissibility of such proof in a court of law that there can be any controversy. Indeed, a strict rule excluding all hearsay would be totally unworkable and it is for its countless and haphazard exceptions that the rule has become conspicuous, or even notorious.

More than four-fifths of Professor Baker's study, *The Hearsay Rule*, is in fact concerned with a critical examination of the various situations in which, exceptionally, hearsay evidence does become admissible and an attempt to define the practical reasons which led the courts to adopt these exceptions. The exposition is clear and valuable, particularly since the author has steered a wary course through the complexities of the terminology employed by the courts and has been at pains to state views and interpretations of cases differing from his own. In almost every instance there is indication of how far the present exceptions are, in his view, justified and might be extended or restricted.

If this part of the book accepts the present law of hearsay as a basis of discussion, the remainder, above all the concluding chapter, tackles the

question from a wider and more radical angle. The author holds that it was the long-established separation of the functions of judge and jury which was responsible for the growth of the rule in Anglo-American law and reaches the general conclusion (in which there is of course nothing new) that many of the limitations and conditions of admissibility are 'arbitrary, unreasonable and unjustifiable'. He states that two future courses are open: either to retain the present rules with modifications, among which the most important are the opening of the field for new exceptions (though it is difficult to see how this is to be achieved) and 'a general discretion to be allowed to the judge to admit hearsay testimony when it consists of casual details necessary for the complete comprehension of a witness's evidence', or to abolish the present rules altogether and to replace them by an approach similar to that laid down by the Court of Criminal Appeal for similar fact evidence in *R.* v. *Sims* [1946] K.B. 531. The latter course, a drastic step in this field, could certainly not be achieved except by legislation and should not in fact be considered until a much wider investigation has taken place into the present law of evidence.

In the discussion of the nature and history of the hearsay rule, too, Professor Baker examines the various theories which have been put forward, but it seems to this reviewer that here he has not given himself quite enough space (on 24 out of altogether 180 pages) to place his thesis on an undisputable basis. His rejection, for instance, of Professor E. M. Morgan's theory that the hearsay rule is a child of the 'adversary system of litigation' would appear to be altogether too cursory. The author is not on quite safe ground in maintaining that hearsay was permitted in Ecclesiastical courts, as he might have noticed on reading to the end of the very sentence from Baron Park's judgment in *Wright* v. *Tatham* which he himself quotes (on p. 12) or by referring to *Burn's Ecclesiastical Law* (8th ed., vol. II, 241); and he is definitely wrong in saying that a hearsay rule was never known on the Continent. Much scientific work, moreover, has in the last 50 years been done there by Hans Gross, Gorphe and many others in order to explore the chief sources of error in hearsay stories and possibilities of combating these, and at least a reference to these studies might have been useful to readers. It is, incidentally, surprising that Professor Baker nowhere hints at the belief widespread among practising lawyers that the hearsay rule is nowadays more honoured in the breach than in observance.

Despite these minor criticisms this is a useful book, not least because it shows up the unsatisfactory state in which this whole branch of the law now finds itself.

H. A. Hammelmann.

A Generation on Trial. By Alistair Cooke. [London : Rupert Hart-Davis. 1950. xiii and 342 pp. 12s. 6d.]

Alger Hiss, a former official of the Department of State in Washington and later President of the Carnegie Endowment for World Peace, denied to a Grand Jury in New York in December, 1948, inter alia that certain secret documents, produced by one Whittaker Chambers from a pumpkin on a Maryland farm and abstracted from the custody of the Department of State, had been 'furnished, delivered and transmitted' by him to Chambers. After a first trial of more than five weeks the jury failed to reach agreement. After a second trial of about eight weeks Hiss was found guilty of perjury. This is a book written by a journalist about a case which is bound to rank among the *causes célèbres* of the world—some may think that it will rank next to *l'affaire Dreyfus*. It is a well, moderately and responsibly written book. It is addressed to the general reader, but until *l'affaire Hiss* comes to be analysed by a legally trained mind, it will no doubt be of considerable value

and interest to lawyers. The paramount conclusion which, unwittingly, perhaps, yet very forcefully, Mr. Cooke brings home to an English lawyer's mind is that those great and wise principles of the common law which are the foundation of the administration of justice in England must be preserved at all cost, and that their relaxation, however slight and however tempting it may seem to be in a given case, is liable to lead to degeneration.

They are, as this book again reminds us, most vividly expressed in the English law of evidence, and many a reader of Mr. Cooke will agree with his comment (p. 229) that

> it is one of the penalties of the comparatively loose rules of evidence in American courts that they allow counsel to elaborate an issue almost into oblivion; so that instead of deepening in the jury's minds the main impression you want to leave, there is a good chance that at the end of the trial the jury may be thrashing in so many cross-currents, none of which seems to lead upstream to the source of the trouble or downstream into the broad ocean of truth, that the jury will seize at the end on any floating log that might bring them safely to shore. I think this is proved by the enormous length of time it takes American juries to make up their minds.

It is not only in rebuttal and sur-rebuttal that evidence on side-issues is allowed to be called (pp. 229 sqq.) and thoroughly to befog the jury's minds. But there apparently also exists a strong tendency to introduce irrelevancies into the main case itself, and very little if anything seems to be known of the strict limitation on corroborative evidence which, in this country, *R.* v. *Baskerville* [1916] 2 K.B. 658, 667 enjoins by requiring it to confirm in some material particular not only the evidence that the crime has been 'committed, but also that the prisoner has committed it'. Thus Chambers, when examined by the prosecution, was allowed to say that in 1940 in a conversation with Mr. Berle he had named Hiss as a Communist (p. 131); a witness was called to say that in 1936 he sold four rugs to a Dr. Schapiro who in turn proved that he sent them to Chambers, the latter having sworn that one of them had been sent by him to Hiss; an F.B.I. officer swore that he drove through Washington with Chambers who without prompting identified the various addresses of Hiss (p. 149); the prosecution called a self-confessed Communist conspirator to say that he had not given the documents to Chambers (p. 171). The catalogue of irrelevancies could be continued for long. How they could assist the jury in deciding the sole issue—did or did not Chambers obtain the documents from Hiss?—must remain a mystery.

These and similar matters, of course, are particularly grave where, as every English lawyer who happened to be in the United States during either trial must have felt with a shock, the trials were proceeding among a roar of the wildest and most prejudicial press and radio comments. They led to a mild rebuke by the judge during the first trial (p. 224), but to no such measures as would inevitably have been taken here. Mr. Cooke unfortunately fails to emphasise that this omission alone must make an English lawyer doubt whether, by English standards, Hiss had a fair trial.

The impression which English lawyers will derive from the book as a whole is such that they will be reminded of the memorable words which Humphreys J., speaking for the Court of Criminal Appeal, uttered in a recent case (*R.* v. *West* [1948] 1 K.B. 709, 719), and which, mutatis mutandis, may well apply to the Hiss trial:

> The case was of a nature bound to excite prejudice in the minds of a jury against the accused. Brothers whose family name indicated an alien origin were alleged to have been concerned in a trading company which had failed in peace time but had prospered in war time. . . . Perhaps there never has been a case in which meticulous care was more clearly

called for to ensure that the guilt of any person convicted should be brought home to him by clear evidence directed against himself, and by that only.

This is an interesting book and one that English lawyers should read to reinforce their determination to maintain in this field the unadulterated doctrine of the common law.

F. A. Mann.

A Handbook on Bankruptcy Law and Practice. By Ivan Cruchley, ll.b. [The Solicitors' Law Stationery Society, Ltd. 18s.]

This book has an ambitious purpose. 'The book is intended', according to the Preface, 'primarily for the legal practitioner.' As Mr. Cruchley himself says, 'Bankruptcy is a complicated subject . . . and the true path to the solution of a particular problem or inquiry is not always readily discernible'. A handbook, therefore, on this subject, should be a comprehensive index to the solution of every problem to which an answer is to be found in the authorities. Unfortunately, this book is neither comprehensive nor an index. The snippets from the Bankruptcy Act and from the Rules which are frequently incorporated in the text (and are not even consistently noted in the margin) are rarely if ever cross-indexed, so that the explanation of any technical references which occur is either assumed to be known, or the inquirer is left with his recourse to the Table of Statutes, the Table of Rules or (if he can light upon the appropriate heading) the Index. Elaborate directions are given for such routine matters as the issuing of bankruptcy notices and the presentation and service of petitions. But the practitioner faced with the problem of when, how, in what circumstances and before whom to proceed by way of motion will find just over one page (pp. 112, 113) setting out miscellaneous rules, which afford him no clue to the form of his notice of motion, the nature of the evidence required or the procedure on the hearing. Space is devoted to the detailed description of what should be set out in documents, of which printed forms are normally used, and can, anyhow, be obtained in Chancery Lane for a trifling sum. No less than thirty pages have been taken up with an Appendix containing 'A Selection of Bankruptcy Forms'. The principle on which these were selected is not evident. On the other hand, the practitioner faced with the knotty problem of an alleged fraudulent transfer or a fraudulent preference will find a bare couple of pages allotted to each of these two somewhat vast topics. Should he have to deal with an application to the court to set aside a part of the bankrupt's earnings, he will find no guidance in the Index to the one passing reference (at p. 95) to section 51 of the Act. He may, however, track down a paragraph (three sentences) under the heading 'Personal earnings and rights of action' (at p. 158) in which section 51 is not mentioned at all. For any reference to the important group of sections of the Act dealing with bankruptcy misdemeanours, he will search the entire book in vain. It is admitted in the Preface that no statement of the rights and duties of a trustee in bankruptcy in respect of the collection and distribution of the bankrupt's estate has been included, and that the law as to deeds of arrangement has not been dealt with. No explanation or excuse is offered for these omissions.

It is true, as Mr. Cruchley observes, that the need exists for a short yet adequate statement of this branch of law. But it is really not possible to recognise this book as fulfilling that need.

Walter Raeburn.

THE LAW AND CUSTOM OF THE SEA. By H. A. SMITH, D.C.L. Second Edition published under the auspices of the London Institute of World Affairs. [London : Stevens & Sons, Ltd. 1950. 216 pp.]

PROFESSOR Smith in the preface of the second edition to his *Law and Custom of the Sea* makes it clear that his book is not an academic treatise but a guide for sea-going officers. He has now added to the first edition a chapter on the responsibility of the individual dealing with the Nuremberg Law. The individual most concerned with the subject, whose responsibility is far from being academic, is the sea-going officer himself and, indeed, any member of the military and naval forces from Field Marshal and Admiral down to the ordinary private and seaman. However, they will all be bewildered rather than guided by the kind of exposition of the Nuremberg Law which the author has adopted.

Professor Smith says that he had in the first edition deliberately avoided this 'distasteful and depressing subject', the discussion of which now becomes unavoidable. He quotes Article 8 of the Charter of the Nuremberg Tribunal, according to which superior orders no longer constitute a defence, though they may be pleaded in mitigation of punishment. Thus 'subordinates must now decide for themselves whether an order, although indisputably binding under the law of the land, is or is not a violation of the laws of the war, and in the event of conflict between the two they must obey the international rule as it will be interpreted by the enemy'. The author comes to the conclusion that 'in any future war officers who carry out such orders will do so at their own peril', and may be convicted for the commission of war crimes even without the allowance of any mitigation of punishments by enemy Tribunals. I cannot see what guidance sea-going officers could derive from these statements in case of war.

Still more bewildering are the opinions of Professor Smith as to crimes against peace. He believes that high ranking officers 'should clearly understand that the performance of their duties at a high level, even when limited by the strictest professional standards, may now expose them to the risk of being hanged'. He refers here to the death sentences against Field Marshals Keitel and Jodl.

Professor Smith concludes that 'the law under which the Germans were punished was made specially for the occasion by the victors long after the acts alleged had been committed. This practice was already established in the Nazi and Communist systems, but was otherwise unknown to the criminal law of civilised countries'. It is difficult to ignore all the implications of such a far reaching statement. Does Professor Smith exclude the declaratory character of principles of the Nuremberg Law in relation to principles of International Customary Law which existed long before the commission of all Nazi crimes?

C. H. ALEXANDER.

THE JEWISH YEARBOOK OF INTERNATIONAL LAW, 1948. Editors : N. FEINBERG, Associate Professor of International Law and Relations, Hebrew University, Jerusalem. J. STOYANOVSKY, D.-EN-D.(Paris), LL.D.(London). [Published at Jerusalem 1949 by Rubin Mass, Publisher. xv and 304 pp.]

SINCE the publication of the *British Yearbook of International Law*, we have had quite a number of similar publications, issued in other countries and designed to set forth the view on international law held by members of the legal profession and teachers of international law in the respective countries.

The *Jewish Yearbook of International Law*, the first volume of which

is the subject matter of this review is not conceived on similar lines. Although published and printed in Israel it is not confined to contributions by writers in Israel. Its purpose is of a more extensive character.

It relates to problems of interest to Jews all over the world and contains contributions from Jewish lawyers not only in Israel but also in U.S.A. and this country.

In their preface the authors point out that this volume has been conceived by them with an eye to the past rather than to the future, and that the future may require a different approach. Whether this expectation is or is not correct may be a matter of some doubt. What is not open to doubt is that, in regard to the period under discussion, the Yearbook fulfils a highly useful function. Some of the articles on international legal problems, relating to the birth of the State of Israel, break virgin ground. The articles by Dr. Stoyanovsky on 'Law and Policy under the Palestine Mandate' and by Dr. Akzin on 'The United Nations and Palestine' describes the point of view of international law on a most critical period in the history of the Middle East. The admirable accuracy and restraint with which these articles were written and the fullness of the material presented by the learned authors deserve commendation.

Among the other contributions, Professor Lauterpacht's article on 'The Nationality of Denationalised Persons' is of outstanding interest. His criticism of the decision of the Divisional Court (*The King* v. *The Home Secretary, ex parte L. and Another* [1945] 1 K.B. 7) is certainly fully justified. In this connection, the learned author could also have referred to the equally deplorable decision in *Lowenthal* v. *Att.-Gen.* [1948] 1 All E.R. 295, where the principle of the Divisional Court's decision was applied with no less disastrous results.

Professor Feinberg's article on the 'Recognition of the Jewish People in International Law', Professor Frankenstein's article on 'The Meaning of the Terms "National Home for the Jewish People"' and to a certain extent also Professor Bentwich's most instructive essay on I.R.O. belong to those contributions which have suffered by the delay in the publication of the present volume owing to the extraordinary conditions prevailing in Israel during the year 1948.

Dr. Nehemia Robinson's article on 'Reparation and Restitution in International Law as affecting Jews' contains a convenient summary of the International Agreements relating to Reparation, Restitution and Ownerless Property. The learned author has, however, passed over the fact that the same international agreements, from which—doubtless—a number of Jewish organisations and individuals have greatly benefited, have also caused grievous harm to a considerable number of Jewish individuals from ex-enemy countries who have been considered 'belligerent enemies' by a number of Allied countries. The attitude of the British Administration of Enemy Property Department has unfortunately established a most deplorable record in their harsh treatment of Jews from these countries.

Dr. Anatole Goldstein's article on 'Crimes Against Humanity' deserves close study at the present time, when both the judgment of the International Military Tribunal at Nuremberg and the Control Council Law No. 10, which incorporates the principles on which this judgment was based, have come under heavy attacks from various quarters.

Professor Kelsen's article on 'Collective and Individual Responsibility for Acts of State in International Law' deals with a problem which largely exceeds the framework of this short book. It is written with the author's usual clarity, but one may well wonder whether it is possible to deal with this topic in the brief space of a contribution to a Yearbook in a satisfactory manner.

In addition to reprints of some documents of outstanding importance in the field of International Law, the *Yearbook* contains a number of briefer notes on individual points of practical importance, among which Mr. Goitein's

note on Habeas Corpus, Mr. Apelbom's summary of the decision of the Palestine Courts on Immigrant Ships, and Mr. Rowson's note on the Abolition of Anti-Jewish Legislation by British Military Administrations, will be perhaps of the most immediate interest to legal practitioners in this country.

It is to be hoped that the editors will find it possible to follow up this first volume of their important and useful publication with a long series of successors.

E. J. Cohn.

Yearbook on Human Rights for 1948. Compiled by the Human Rights Division of the United Nations Secretariat. [Lake Success: United Nations; London: H.M.S.O. 1950. xiv and 535 pp. 45s.]

The volume under review is the third *Yearbook on Human Rights* published by the Human Rights Division of the Secretariat of the United Nations, and, like its predecessors, contains the texts of those portions of national legislation and of international treaties and agreements which relate to the development of human rights. In addition, there is the usual section devoted to the activities of the United Nations in connection with human rights, which are discussed from the points of view of the Universal Declaration and Covenant of Human Rights, the Convention on Genocide, the Status of Women, Freedom of Information, and the Prevention of Discrimination and Protection of Minorities, while under a general heading there is reference to such matters as Stateless Persons, the Right of Asylum, the Declaration of Old Age Rights and the Declaration of the Rights of the Child.

Among the new features introduced into the present volume is a condensation of the electoral laws of the world. The section devoted to the Union of South Africa only illustrates the situation to June, 1946; and although the summary for the United States points out that since 1948 American Indians may vote in all States, it makes no reference to the difficulties experienced by Negroes attempting to exercise the franchise in the South. Another important new feature concerns the human rights provisions of agreements drawn up by or under the auspices of the specialised agencies, and those relating to special territories, for example, Jerusalem, the trust territories and also the non-self-governing territories—where the administering authorities have been courteous enough to provide the information.

Countries whose national legislation features in the 1948, but not the 1947 volume are Albania, Costa Rica, Egypt, Israel, (South) Korea, Monaco and Uruguay, while Bulgaria, Byelorussia, Cuba, Greece, Lebanon, Malta, the Mongol People's Republic, Siam, Spain, Transjordan and the Ukraine have disappeared, although in some cases their electoral provisions are reproduced. It is difficult to understand why these countries, particularly those of them who are members of the United Nations, did not follow Austria's example and state simply: 'No constitutional or legislative texts of importance concerning human rights were promulgated during the year 1948'.

The strongest criticism that can be levelled at the series of *Yearbooks on Human Rights* is that they give a completely distorted view of the situation as it really is. One is left with the impression that throughout the world there is a continual movement for the promotion and development of human rights. No reference is ever made to legislation whose avowed object is to deny the fundamental freedoms and human rights of some group or other, and there is never any reference to judicial decisions which either extend or narrow the scope of the legislation reproduced.

It is very unfortunate that it takes so long to publish this *Yearbook*. What could be more ironical than to read in 1950 that 'the South Africa Act, 1909, was not amended during 1948. No legislation having a bearing on

fundamental human rights was passed during 1948 by the Parliament of the Union of South Africa or by the Provincial Councils'! In 1952 it will be interesting to see what is said about the activities of the Union in 1950.

L. C. Green.

L'Evolution des Rapports Politiques depuis 1750 (liberté—intégration—unité). By Pierre Duclos. [Paris : Presses Universitaires de France. 1950. 600 fr.]

Political Science, as it is taught in Great Britain and America, is a new academic discipline in France, struggling for emancipation from jurisprudence, itself taught in rather a rigid analytical form. The object of this book is to provide a handbook for students, in the form of a general survey of the development of politics since the eighteenth century, and its approach is primarily historical. It falls into three sections. The rise of the liberal state is first described and its basic ideas analysed. Secondly, the new economic and social problems created by the liberal integration of politics, and the attempted answers of social democracy, are studied. Finally, in the last stage the problems of politics shift from a national to an international basis, with the creation of great international unities which so far have failed to discover an effective means of co-operating peacefully with one another.

M. Duclos has succeeded admirably in sketching in broad outlines the main development of European politics—there is little about America—and in bringing out the fundamental issues. At the same time he has much that is interesting to say on subsidiary questions. An incidental reference to the Melbourne Cabinet of 1812–1827 needs correction; and I should personally find it difficult to agree with the description of Sieyes in 1789 as the *porte-parole* of Rousseau, which fails to allow for the great divergence in their political conceptions. It is useful to have a French view on some points that are commonly given a different interpretation here. For instance, M. Duclos is critical of the weightage which the British electoral system usually gives to the majority, and of its tendency towards the elimination of the smaller parties. He sums up the return of the Fourth Republic in France to the political habits of the Third Republic as fundamentally evidence of a profound attachment to a traditional type of liberal democracy.

The concluding chapter, which deals with the political crisis of the present day, described as the 'hypertrophy' of politics, is not the least interesting. The crisis springs, it is suggested, from the hesitations of contemporary civilisation as to the form in which it will restabilise itself, and its basis is the ideological schism between the cult of the Individual and the cult of Power. The discovery of a new order which will revivify traditional ideas is the task of the present, and the greatest danger is the denial of the intellectual freedom which is necessary to success in the search. M. Duclos' book is encouraging evidence that the unpartisan study of political problems is making its way in France.

Alfred Cobban.

The Law of Income Tax. By E. M. Konstam, K.C. Eleventh Edition. [London : Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1950. Vol. 1, lxxvii and 529 pp. (with index 82 pp.). Vol. 2, loose-leaf. £8 8s. net with one year's free service.]

This truly classic work upon the difficult but all-pervading subject of Income Tax has now reached its eleventh edition in less than thirty years, a fact which

speaks for the value of the work more than any words of your reviewer can. The previous edition was noted at length at (1946) 10 Mod.L.Rev. 94–96, so that this review will be confined to changes made since then.

In the first place the work has now been divided into two parts. Volume 1 contains the learned author's narrative commentary of the statute and case law, arranged very much on the lines of the last edition; it also contains the Tables of Statutes and Cases, and the Index. One great improvement made is the paragraphing of the sections with the number of the paragraph at the head of the page, instead of the page reference. Volume 2 is in loose-leaf form and contains the provisions of the relevant Acts, Regulations and Orders, with most useful paragraph references back to the commentary in Volume 1; this part will be kept up to date by an annual service (free for the first year) devoted to a keyed annotation to the text in Volume 1 and subsequent statutes, etc. A valuable addition is the inclusion in the statutes of those Acts, not devoted to finance, which have, however, a bearing on income tax, such as the Crown Proceedings Act, 1947, the Agricultural Act, 1947, etc.; this enables the practitioner to have all the relevant law before him under one cover.

An improvement since the last edition is the grouping of the commentary on the Double Taxation Reliefs under one head (Ch. 2) though this might have been better left until Mr. Konstam had dealt with the liability under the five familiar Schedules and Surtax. The sections dealing with Residence and Domicile (pars. 287–292) have been re-written to the great profit of the reader, although your reviewer still considers that the sections devoted to 'Residence of a Company' (pars. 85, etc) should, for the reasons he gave in his last review, be grouped under one head with those relating to the individual. The paragraphs devoted to 'Deduction of Tax at the Source' (209 *et seq.*) have also been expanded with great advantage and contain many references to cases where the Inland Revenue was not one of the parties; in fact the whole of this chapter (No. 9, Interest, Annuities, etc.) is a mass of learning.

Minor criticisms are really out of place with so monumental a work but the following points might be noted for the next edition. The doubt expressed as to whether *Deverell, Ltd.* v. *Rees* (1943) 25 Tax Cas. 467 (par. 110, n. 73) is good law seems resolved in its favour by *Associated Cement Manufacturers, Ltd.* v. *Kerr* [1946] 1 All E.R. 68 noted at par. 118; while the House of Lords has recently overruled the decision in *Atkinson* v. *Goodlass Wall, Ltd.* [1948] 2 All E.R. 1095, noted at par. 244. The statement in par. 307 that 'The question whether a body is established for charitable purposes is a question of law' needs qualifying in view of the reliance of the House of Lords in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* [1948] A.C. 31, upon the finding of fact by the Special Commissioners—see also your reviewer's observations on this point at 62 L.Q.R. 18–20. Although the Index is even more thorough than before its value would be considerably enhanced if the sub-headings were rearranged in alphabetical order, for some run to well over twenty entries.

Your reviewer finds it difficult to add to his previous encomium on this really excellent work, more indispensable than ever in its new lay-out; he himself invariably has recourse to it whenever any difficult problem presents itself. In his opinion no practitioner engaged in Revenue Law can afford to be without his *Konstam*.

A. Farnsworth.

Arnould on Marine Insurance. 2 vols. Thirteenth Edition. By Lord Chorley of Kendal. [London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1950. £8 8s.]

An interval which is almost exactly a century stands between the first edition of this famous treatise, which was published in 1848, and the latest edition,

the thirteenth, in which the preface and the title page are dated September, 1949 and 1950 respectively. Lord Chorley of Kendal, who has edited the new edition, has done his work admirably, and has earned the gratitude of all who have occasion to use the book.

There are changes in format and printing which will be noticed at once by those who have used earlier editions. The treatise used to appear in two volumes of about equal size, but the second volume is now distinctly thicker than the first. The pages of text, excluding appendices, which were 1737 in the twelfth edition, are now reduced to 1193. The compression and the deletion, which the editor has judiciously permitted to himself here and there, account in part for this reduction, but in the main it has been brought about by less generosity of margin and of spacing in the print. In the present conditions of printing these are changes of which it would not be legitimate to complain. The marginal summaries of the text, which had always seemed to me to be an attractive feature of previous editions, are replaced by summaries in thicker type printed on the breadth of the page. The number of the page was printed in previous editions in the top outer corner of the page, but it is now banished to the bottom of the page and its old place is occupied by paragraph numbers. We may or may not like some or any of these changes, but they are minor things and we shall get accustomed to them. There are a few mistakes in spelling and printing, *e.g.*, in section 688 the word 'unseaworthiness' both in this and in the twelfth edition is a misprint for 'seaworthiness' and so obvious that no one can have been misled by it. There are a few places where slight amendment might be suggested. Thus, *e.g.*, section 97 deals with the legal results in Prize Law of such circumstances as these, *viz.*, a trader in country X has a trading establishment in a foreign country which becomes a hostile country by the outbreak of war and it is alleged that the goods which have been seized were the concern rather of that establishment than of the parent house in country X, and the references might usefully be supplemented by a citation of the *Glenroy* [1945] A.C. 124, which is indeed cited in later sections of the work. Section 106, note 21, cites *Universo Ins. Co.* v. *Merchants' Marine Ins. Co.* [1897] 2 Q.B. 93, and I should have retained the reference back which occurs in the previous edition to the comment on that decision in a note to section 56. But it would be unreasonable to use any great part of the space of this review on such matters. They are things which require nothing more than a brief and private notification to the editor. Lord Chorley has maintained a high standard of editing, in which thoroughness and independence of judgment are happily combined and ingenuity or subtlety of interpretation is controlled by a sense of the true nature and purpose of the commercial transaction.

One topic which is much discussed in the reports on marine insurance cases since the twelfth edition was published in 1939 is the application of the rule often stated in the words of the Latin tag *Causa proxima non remota spectatur*. Lord Chorley by his alterations in the text and by his notes points out the emphasis that the courts have again laid on the non-chronological character of the rule. The proximate cause of the loss or the damage is not the cause which is nearest in point of time, but that which is the effective or dominant, or dominantly effective, cause of the loss or damage. That is the right test. It may be stated in words which Lord Wright used in his article on Contributory Negligence at p. 3 of Vol. 13 of this Review, *viz.*, 'Clearly the mere element of time cannot decide the issue. Potency, not chronology, is the test'. Inasmuch as it often became necessary to decide whether a loss at sea had been caused by a maritime peril or by a war risk, the above interpretation of the *proxima causa* rule was emphasised as the right interpretation in the second world war as it had been emphasised in the first. See *Yorkshire Dale S.S. Co.* v. *Ministry of War Transport* [1942] A.C. 691 (H.L.). Recent decisions have shed fresh light on the application of the test, but they have not finally disposed of all difficulties, as Lord Chorley points out in his useful comments in section 905g, and indeed no such

anticipatory determination of the difficulties involved in the application of such a rule can be expected.

The reported cases since 1939 also contain interesting decisions on the insurance of freight, *viz.*, the decisions in the complicated cases of *Carras* v. *London and Scottish Assurance Corporation* and *Kulukundis* v. *Norwich Union, etc., Society, Ltd.*, which went as far as the Court of Appeal (see [1936] 1 K.B. 291 and [1937] 1 K.B. 1 respectively for the judgments in that court), and in *Robertson* v. *Petros M. Nomikos, Ltd.* [1939] A.C. 562, which reached the House of Lords. The topic is difficult in itself and its difficulties are increased in the *Carras* and the *Nomikos Cases* because it involves problems connected with the Institute Freight Clauses both in voyage and time policies. In sections 1163a to d Lord Chorley has set out the effect of these decisions, and those who have occasion to continue the discussion of the conclusions in the *Carras* and the *Kulukundis Cases* and of the reasons given for them will be grateful to him for his analysis in section 1163c. It is not possible here to state even in summary fashion the various problems to which the analysis calls attention. A matter of minor amendment arises here, and I would suggest that attention should be called to the change in the numbering of the Institute Time Clauses Freight as they existed when the above cases were decided and as they appear in the 1943 version in Appendix 2, pp. 1247–9. The clause (*e.g.*) which is described by the number 5 in section 1161a and in note 13 is numbered 6 in the 1943 version.

It is stated in section 1213 that, supposing that the owner of a ship gives notice of abandonment to the underwriter and the underwriter rejects it, then 'the property (—*i.e.*, in the ship—) becomes *res nullius*'. The authorities which are cited do not seem to me to justify such a wide and positive assertion.

The frustration of a contract which is not a contract of marine insurance but a contract made between a shipowner and a charterer or between a shipowner and a goods owner has given rise to many problems and decisions in respect of the contract of marine insurance, which has been made in connection with the same transaction. Some of them are connected with the operation of the well-known words in the policy of marine insurance, 'restraints of princes'. See sections 832 to 832f of the edition under review. Lord Chorley has added to the text a reference to one of the most important decisions in that class, decided in the House of Lords in 1941, *Rickards* v. *Forestal Land Co., Ltd.* [1942] A.C. 50. I am not sure that I should agree with the observation in note 10 to section 832 to the effect that 'except perhaps in *Sanday's Case* the doctrine of "commercial frustration" does not appear to have been applied in marine insurance'. In *Sanday's Case* [1916] 1 A.C. 650 the insurance was on goods shipped by British merchants on British ships for carriage to Hamburg. War between Great Britain and Germany broke out while the goods were still at sea. From that moment the further prosecution of the voyage became illegal, as it involved trading with the enemy. To quote from the speech of Lord Wright in *Rickards* v. *Forestal Land Co., Ltd.* (*supra*) at p. 91: 'The cargoes (*i.e.*, the cargoes in *Sanday's Case*) were safe on the carrying ships but the adventure could not be completed because the port of destination had become enemy territory and hence the adventure of the British goods owners was frustrated'. The ships discharged their cargoes in the United Kingdom and the goods owners gave notice of abandonment and succeeded in their claim. It seems to me that in principle a parallel combination of the doctrine of commercial frustration and the law of marine insurance is to be found in such cases as *Rodocanachi* v. *Elliott* (1873) and *Jackson* v. *Union Marine* (1874) and some support for this view is derivable from the opening words of section 832f. But I may have failed to do justice in some way to the point of Lord Chorley's observation.

In the printing of the Marine Insurance Act, 1906 in Appendix 1 the sections of the book which deal with a particular section of the Act are quoted against that section. Those who use the book will be glad that this

excellent practice has been continued. The Appendices also contain a full and helpful selection of Institute Clauses and also the York-Antwerp Rules of 1950.

C. T. Le Quesne.

Inventions, Patents and Monopoly. Second Edition. By Peter Meinhardt. [Stevens & Sons, Ltd. 320 pp. 30s.]

With the passing of the Monopoly and Restrictive Practices (Inquiry and Control) Act, 1948, and the Patents Act, 1949, Mr. Meinhardt has brought out a second edition of his valuable work. In addition to these Acts, Mr. Meinhardt has extended his knowledge of the subject, and has passed on to the reader the benefit of his study. It is a pity that Mr. Meinhardt has not thought fit to extend his historical note on the patent law for his brief notes show that it is a fascinating subject for investigation. This book was welcomed when it first came out as being 'helpful in interpreting to the ordinary citizen, as well as to the expert, the spirit and purpose of the patent law'; and a second reading of the book confirms the view that it is not only informative but can be read with enjoyment.

With the removal of the passages relating to suggestions for reform, the book becomes more authoritative and less controversial. The new Acts are clearly dealt with in Part 3 of this edition.

I. G. R. M.

Other publications received :—

The Justices' Handbook. Second edition. By J. P. Eddy, K.C. With a Foreword by the Right Hon. Lord Oaksey. [Stevens & Sons, Ltd. 1951. 12s. 6d. net.]

Examination Note-book of The English Legal System, including a History of Judicial Institutions. By R. H. Graveson. Second edition. By Joseph Jackson, M.A., LL.B., LL.M. [Sweet & Maxwell, Ltd. 1951. 6s. 6d. net.]

Real Property in a Nutshell. Second edition. By H. F. J. Teague, LL.B. [Sweet & Maxwell, Ltd. 1951. 6s. 6d. net.]

The Public Utilities Street Works Act, 1950. By Harold Parrish, LL.B. [Sweet & Maxwell, Ltd. Stevens & Sons. W. Green & Son. 8s. 6d. net.]

A Guide to the Microfilm Collection of Early State Records. Prepared by the Library of Congress in Association with the University of North Carolina. Collected and compiled under the direction of William Sumner Jenkins. Edited by William A. Henrick. Photoduplication Service. [The Library of Congress, Washington 25, D.C. $5.00.]

Clerk and Lindsell : Law of Torts. Third (Cumulative) Supplement to August 31, 1950. By B. Chedlow. [Sweet & Maxwell, Ltd. 4s. net.]

The School, Society and the Delinquent. By Robert Birley, C.M.G., LL.D., Headmaster of Eton College. The Tenth Clarke Hall Lecture. [The Clarke Hall Fellowship, Tavistock House South, Tavistock Square, London, W.C.1. 1s.]

The National Health Service Act, 1946, Annotated. Supplement to 1948 Edition. By S. R. Speller, LL.B. [H. K. Lewis & Co., Ltd., 136 Gower St., London, W.C.1. xxxvi and 285 pp. 1951. 27s. 6d. net.]